TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~192~~ 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALPHONSINE McGREW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MAY 25, 1901.

(18,187.)

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No. 336.

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a In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, Appellant. } S. F. No. 1230.

Transcript on Appeal.

(From superior court, city and county of San Francisco.)

Chickering, Thomas & Gregory, attorneys for appellant.
Platt & Bayne, attorneys for respondent.

Filed this Dec. 13, 1897 *day of* ——, *A. D. 1897.*
T. H. WARD, *Clerk,*
By E. S. BUTTERWORTH,
Deputy Clerk.

1 In the Supreme Court of the State of California.

Transcript on Appeal.

(From superior court, city and county of San Francisco.)

In the Superior Court of the City and County of San Francisco, State of California.

ALPHONSINE McGREW, Plaintiff,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW York, Defendant. } No. 50595.

Amended Complaint.

Plaintiff above named, complaining of the defendant above named, for cause of action alleges—

That the defendant is, and at all the times herein mentioned has been, a corporation duly organized and existing under the
2 laws of the State of New York, having its principal place of business in the city of New York, State of New York.

That on the 14th day of September, in the year 1892, the said defendant, The Mutual Life Insurance Company of New York duly made, executed and delivered to Henri Goulden McGrew a certain policy of insurance wherein and whereby the said defendant promised and agreed to pay unto the said plaintiff, Alphonsine McGrew, the sum of five thousand ($5,000.00) dollars, upon the death of said Henri Goulden McGrew during the continuance of the said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri Goulden McGrew, and upon acceptance of satisfactory proofs at its home office of the death of said Henri Goulden McGrew during the continuance of said policy, and upon the condition that the annual premium of one hundred and

thirteen $\frac{50}{100}$ ($113.50) dollars should be paid in advance on the delivery of said policy, and thereafter to said company at its home office in the city of New York, State of New York, on the 14th day of September, in every year during the continuance of said policy, and subject to the provisions, requirements and benefits stated on the back of said policy.

That the said Henri Goulden McGrew paid said annual premium of one hundred and thirteen $\frac{50}{100}$ ($113.50) dollars in advance upon the delivery of said policy, and thereafter paid to said com-
3 pany the said annual premium every year during the continuance of said contract and up to the time of his death.

That said Henri Goulden McGrew died upon the 22nd day of October, in the year 1894, at Honolulu, in the Hawaiian islands.

That said payments of said premiums were made in said Honolulu, and were there accepted by said defendant.

That, since the death of said Henri Goulden McGrew, the plaintiff has furnished to said defendant satisfactory proofs of the death of said Henri Goulden McGrew during the continuance of said policy, and said satisfactory proofs have been accepted by said defendant at its home office, in said city of New York.

That said plaintiffs presented said proofs to said defendant on or about the 9th day of February, in the year 1895, and demanded of said defendant the payment of said sum of five thousand ($5,000.00) dollars, under and in accordance with said policy of insurance.

That said defendant refused, and has ever since refused, and still refuses, to pay to said plaintiff, the said sum of five thousand ($5,000.00) dollars, or any part thereof, and has not paid to said plaintiff the said sum of five thousand ($5,000.00) dollars, or any part thereof.

That the following are the provisions, requirements, and benefits set forth on the back of said policy of insurance, to wit:—

4 Payment of premiums.—Each premium is due and payable at the home office of the company, in the city of New York, but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only five-year distribution policies in force at the end of such term, hall share in such distribution of the surplus; and no other disribution to such policies shall be made at any previous time. All urplus so apportioned may be applied at the end of such period in

payment of future premiums on this policy, if requested in writing, or may then be drawn in cash. The surplus may be applied
5 at each distribution to purchase additional insurance, without medical examination; provided, such application of the surplus be elected in due form not less than two years before the end of the first dividend period of five years; otherwise, a satisfactory examination will be required for each such application of the surplus.

Paid-up policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount required by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the company at the end of the said first period of five years, and eighty per cent. of the reserve computed by the American table of mortality and four and one-half per cent. interest, and the surplus as defined above, will be paid therefor in cash.

Incontestability.—It is hereby further promised and agreed that, after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premium, at the times and place in the manner stipulated in said policy, and that the requirements of the company as to age,
6 and military or naval service in the time of war, shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the holder of this policy.—No agent has power, on behalf of the company, to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The company declines to notice any assignments of this policy until the original copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment.

Wherefore, plaintiff prays for the judgment of this honorable court against said defendant for the sum of five thousand ($5,000.00) dollars and for interest thereon from the 9th day of February, in the year 1895, and for her costs of suit.

PLATT & BAYNE,
Attorneys for Plaintiff.

Duly verified.

(Endorsed:) Filed Aug. 14th, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

7 (Title of Court and Cause.)

Demurrer to Amended Complaint.

The defendant demurs to the amended complaint herein, and specifies as grounds for demurrer that said complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is uncertain in this, that it does not appear therein, and cannot be determined therefrom, whether the requirements of said company, as to age, and military or naval service in time of war, have been observed by the said insured.

III.

That the said amended complaint is ambiguous, for the same reason as heretofore alleged, upon the ground of uncertainty.

IV.

That this court has no jurisdiction over the subject-matter of this action.

Wherefore, having fully answered, defendant prays that it go hence with its costs.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 3, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

8 (Title of Court and Cause.)

Minute Order Sustaining Demurrer to Plaintiff's Amended Complaint.

In this action, the demurrer of the defendant to plaintiff's complaint having been heretofore submitted to the court for consideration and decision, and now the court, having considered the same, and being fully advised in the premises, it is ordered that said demurrer be, and the same is, hereby sustained, with leave to said plaintiff to amend her complaint in five days.

October 14, 1895.

A. A. SANDERSON, *Judge.*

(Title of Court and Cause.)

Amendment to Amended Complaint.

I.

Amend line 19, page 2, by inserting the words "and San Francisco," after the word "Honolulu," so that said line will read, "said Honolulu and San Francisco, and were there accepted by said defendant":

II.

Insert between lines 19 and 20 on page 2 of said complaint, the following: "That the requirements of said defendant as to age, and

military or naval service in the time of war, were all observed by said Henri Goulden McGrew during the continuance of said
9 policy, and said Henri Goulden McGrew duly performed all the conditions on his part to be performed under said policy, and during the continuance thereof."

PLATT & BAYNE,
Att'ys for Plaintiff.

Duly verified.

(Endorsed:) Filed Oct. 15, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

(Title of Court and Cause.)

Demurrer to Second Amended Complaint.

Defendant demurs to complaint herein, and specifies as grounds for demurrer:—

I.

That this court has no jurisdiction over the subject-matter of said action.

II.

That the said complaint states no cause of action against this defendant.

Wherefore, having fully answered, said defendant prays that it be hence dismissed, with its costs.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 25th, 1895. C. F. Curry, clerk. By J. Voisinet, deputy clerk.

10 (Title of Court and Cause.)

Minute Order Overruling Demurrer and Denying Motion to Strike Out Parts of the Plaintiff's Second Amended Complaint.

In this action, the defendant's motion to strike out parts of plaintiff's second amended complaint, and the demurrer to the second amended complaint coming on regularly for hearing, Messrs. Platt & Bayne appearing as counsel for the plaintiff, and no appearance being made on defendant's behalf—

It is ordered, that said motion be denied for want of prosecution, and that said demurrer be, and the same is, hereby overruled for want of prosecution.

Ten (10) days to answer.

Entered November 1st, 1895.

A. A. SANDERSON, *Judge.*

(Title of Court and Cause.)

Amended Answer.

Comes now the above-named defendant, and by leave of court first had and obtained, files this its amended answer to the amended complain- herein, and in that regard admits, denies and alleges, as follows, to wit:—

This defendant denies that, on the 14th day of September, 1892, or at any other time, it duly, or at all, made, executed, and
11 delivered, or made, or executed, or delivered, to Henri Golden McGrew, a certain, or any, policy of insurance, wherein and whereby said defendant promised and agreed to pay unto the said plaintiff, Alphonsine C. McGrew, the sum of $5,000.00 upon the death of said Henri Golden McGrew, save as hereinafter stated.

And further answering, this defendant alleges:

I.

That heretofore, to wit: on or about the 14th day of September, 1892, this defendant did duly make, execute, and deliver to Henri Golden McGrew a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant did promise and agree to pay unto Alphonsine C. McGrew, as the wife of said Henri Golden McGrew, the sum of five thousand ($5,000) dollars, upon the death of the said Henri Golden McGrew, during the continuance of said policy of insurance, provided said Alphonsine C. McGrew were living at the time of the death of said Henri Golden McGrew, and upon acceptance of satisfactory proof of the death of said Henri Golden McGrew, during the continuance of said policy.

II.

That the said Henri Golden McGrew, was, upon said 14th day of September, 1892, and continuously thereto up to the time of his
12 death, as hereinafter set forth, a resident of the Hawaiian islands.

III.

That upon the said 14th day of September, 1892, and continuously thereto down to the 24th day of August, 1894, the said Henri Golden McGrew and said plaintiff, Alphonsine C. McGrew, were husband and wife.

IV.

That subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri Golden McGrew did become of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing at said city of Honolulu, was duly appointed the guardian of the person and estate of said Henri Golden McGrew, an incompetent person, as aforesaid.

V.

That upon the 8th day of February, 1894, the said Charles L. Carter, guardian as aforesaid, and on behalf of Henri Golden McGrew, did file in the circuit court of the first judicial circuit of the Republic of Hawaii, which said court had jurisdiction over said parties and said cause, a libel praying for a divorce from the said Alphonsine C. McGrew upon the ground of adultery of the said Alphonsine C. McGrew; and thereafter the said Alphonsine C. McGrew, being then and there a resident of said Hawaiian islands, did appear in said action and contest the same.

13 VI.

That thereafter, to wit: upon the 18th and 20th days of August, 1894, the said cause was heard in the said circuit court, and both parties appeared therein; and subsequent, to wit: on the 23rd day of August, 1894, a decision was rendered by the said circuit court dissolving the bonds of matrimony theretofore existing between said parties, upon the ground of the adultery of the said Alphonsine C. McGrew, which said decree of divorce has never been modified or set aside, and ever since has been, and now is, in full force and effect.

VII.

That under and by virtue of the Hawaiian law in force at the time said decree of divorce was granted and now in force, it is provided:

"When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall be issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the courtesy; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her, as it may deem proper."

14 That under and by virtue of the foregoing provision of law, and decree of divorce, all rights of the said Alphonsine C. McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever.

VIII.

That thereafter, to wit: on or about the 22nd day of October, 1894, the said Henri Golden McGrew died at Honolulu, in the Hawaiian islands.

IX.

That subsequent to the death of said Henri Golden McGrew, as aforesaid, one J. O. Carter was, by an order duly given or made, appointed the administrator of his estate by a court of competent jurisdiction of the said Hawaiian islands, and thereafter the said

J. O. Carter, as administrator aforesaid, did commence an action in the circuit court of the first circuit of the Hawaiian islands against The Mutual Life Insurance Company of New York, defendant herein, to recover the amount of said policy of insurance, to wit: the sum of five thousand ($5,000) dollars, which said circuit court of the first circuit was a court of competent jurisdiction.

Thereafter, the said Mutual Life Insurance Company of New York, defendant herein, did appear in said action and contest
15 the same; and, notwithstanding, judgment was thereafter given, to wit: on or about the 15th day of October, 1895, in favor of the said J. O. Carter, administrator of the estate of said Henri Golden McGrew, deceased, and against said Mutual Life Insurance Company of New York, defendant herein, for the said sum of five thousand (5,000) dollars, interest and costs, which said judgment was thereafter sustained by the supreme court of the Republic of Hawaii, and the motion for rehearing of said cause made by this defendant denied by the said supreme court, and the said judgment has never been set aside, and is now final.

That subsequent to the denial of said motion for rehearing, said defendant did pay to the said J. O. Carter, administrator, as aforesaid, the full amount due thereon, to wit: the sum of five thousand five hundred and ninety-nine dollars and fifty-nine cents ($5,599.59), and did receive from the said administrator the said policy of insurance duly canceled.

Wherefore, having fully answered, defendant prays that it be hence dismissed, with its costs.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

Duly verified.

(Endorsed:) Filed May 19th, 1897. C. F. Curry, clerk. By Morgan Backus, deputy clerk.

16 (Title of Court and Cause.)

Decision.

This cause came on regularly for trial on the 13th day of May, in the year 1897, in department number 3 of this court, Hon. George H. Bahrs, presiding; a jury trial having been duly waived in open court. H. G. Platt, Esq., appearing for the plaintiff, and Warren Gregory, Esq., appearing for the defendant; and oral and documentary evidence having been offered, and the court having fully considered the law and the evidence, and being fully advised in the premises, finds as follows:—

Findings of Fact.

1. On the 14th day of September 1892, this defendant made, executed, and delivered to Henri G. McGrew, a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant promised and agreed to

pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand dollars ($5,000.00), upon the death of the said Henri G. McGrew, during the continuance of said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri G. McGrew, and upon acceptance of satisfactory proof of the death of said Henri G. McGrew, during the continuance of said policy.

2. Henri G. McGrew died on the 22nd day of October, 1894, in Honolulu, Hawaiian islands, and said plaintiff survived him.

17 3. Said Henri G. McGrew upon said 14th day of September, 1892, and continuously and up to the time of his death, was a resident of, and domiciled in, the Hawaiian islands.

4. On the 9th day of February, 1895, plaintiff presented to said defendant satisfactory proof of the death of said Henri G. McGrew, and demanded of said defendant the payment of the sum of five thousand ($5,000.00) dollars, under and in accordance with the terms of said policy of insurance, but defendant has never paid the same, or any part thereof.

5. Subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri G. McGrew became of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing in the city of Honolulu, was duly appointed the guardian of the person and estate of said Henri G. McGrew, an incompetent person, and continued to hold such office of guardian at the time of the filing of the libel of divorce, and the proceedings thereunder hereinafter mentioned.

6. On the 8th day of February, in the year 1894, Charles L. Carter, as guardian and on behalf of Henri G. McGrew, an incompetent person, filed in the circuit court of the first judicial circuit of the Republic of Hawaii, which said court has jurisdiction over

18 said parties and over libels for divorce, a libel praying for a divorce from said plaintiff on the ground of her adultery; and thereafter, and on the 11th day of April, 1894, this plaintiff being then a resident of, and domiciled in, said Hawaiian islands, appeared in said action and contested the same.

7. On the 23rd day of August, 1894, a decision was rendered, and on the 24th day of August, 1894, a decree was signed in said cause by the said circuit court, dissolving the bonds of matrimony theretofore existing between said Henri G. McGrew and this plaintiff, upon the ground of the adultery of this plaintiff.

8. On the 5th day of April, 1894, this plaintiff left the Hawaiian islands with the intention of not returning to said islands, but of coming to the State of California and of making her home in, and permanently residing in, said State. And thereafter, and in due course of her voyage from the Hawaiian islands, and in said month of April, this plaintiff arrived in the State of California, and with said intention above mentioned, thereupon took up her residence in, and made her home in, said State, and with said intention has ever since continuously remained in, and resided in, and made her home in, said State of California; and on the 23rd and 24th days of August, 1894, was actually in, and residing in, said State, with the in-

tention above mentioned of permanently residing and making her home in said State of California.

19 9. Prior to said 5th day of April, 1894, this plaintiff had been excluded by said Charles L. Carter, as such guardian, from the home of said Henri G. McGrew, and was by him thereafter prevented from returning, and has ever since and until the death of said Henri G. McGrew been by him prevented from returning to the same, and was, on said 5th day of April, excluded from said home by said guardian.

10. On said 5th day of April, 1894, this plaintiff had no home, and has never since had a home in the Hawaiian islands.

11. On the 27th day of August, in the year 1894, this plaintiff, through her attorney, filed an exception to said decree of divorce, and gave notice of the filing of said exception, both in accordance with the rules of said circuit court.

12. On the first day of October, 1894, this plaintiff, through her attorney, filed with the clerk of said circuit court a bill of exceptions to said judgment of divorce, within the time allowed by law, and in accordance with a rule of said circuit court, as hereinafter set forth.

13. At the time of the filing of said bill of exceptions, the judge who tried said action of divorce was absent from the Hawaiian islands, and remained absent from said islands until after the death of said Henri G. McGrew.

20 14. Said bill of exceptions has not yet been allowed or certified by the judge of said circuit court, and said exceptions have never been disposed of by said supreme court.

15. The following Hawaiian law was in force in the Hawaiian islands at the time said decree of divorce was granted, to wit: "When a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

16. The following statute was in full force and effect in the Hawaiian islands at all the times herein mentioned: "Any party aggrieved by any order or decision of the circuit court, may except thereto, and his exceptions shall be duly noted, and certified to the supreme court, and no order or decree for a divorce shall be made absolute, until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the supreme court, sitting *in banco*, and if the court *in banco* shall be of opinion that the order or decision excepted to in said circuit court was erroneous, they shall so certify, and thereupon the case shall be heard anew.

17. The following rule of the circuit court of the Hawaiian islands was duly made and given and was in full force and effect in

21 the Hawaiian islands at all the dates hereinabove mentioned: "Bills of exceptions are to be presented to the judge who presided at the trial within the time prescribed by law, and in case of his absence they may be filed with the clerk, whose duty it shall be to present the same to the judge at the earliest opportunity, and shall endorse thereon the day and hour of filing."

Wherefore, it follows as conclusions of law from the above findings of fact—

(1.) That the rights of this plaintiff in and to said policy of insurance and the moneys due thereunder never passed to said Henri G. McGrew, nor did he ever hold her rights or property in said policy or money, nor did said policy or the money due thereunder, nor this plaintiff's rights therein, ever become the property of said Henri G. McGrew.

(2.) That defendant is indebted to plaintiff upon said policy of insurance in the sum of five thousand dollars, together with interest thereon at the legal rate from the 9th day of February, 1895, and said plaintiff is entitled to judgment against the defendant for the sum of five thousand dollars, with interest thereon at the rate of seven per cent. per annum from the 9th day of February, 1895, and for her costs herein.

Let judgment be entered accordingly.

GEORGE H. BAHRS, *Judge.*

Dated October 11, 1897.

(Endorsed:) Filed Oct. 11, 1897. C. F. Curry, clerk. By T. C. Maher, deputy clerk.

22 (Title of Court and Cause.)

Judgment.

This case came on regularly for trial, H. G. Platt, Esq., appearing as counsel for the plaintiff, and Warren Gregory, Esq., appearing for defendant, a trial by jury having been expressly waived by counsel for the respective parties. The case was tried before the court, sitting without a jury, whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and certain documentary evidence was introduced. The evidence being closed, the case was submitted to the court for consideration and decision, and after deliberation thereon, the court delivers its finding and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged, and decreed that Alphonsine McGrew, plaintiff, do have and recover from The Mutual Life Insurance Company, of New York, a corporation, defendant, the sum of five thousand nine hundred and thirty-five and $\frac{30}{100}$ (5,935.30) dollars, with interest thereon at the rate of seven (7) per cent. per annum from the date hereof till paid, together with the said plaintiff's costs incurred in this action amounting to the sum of thirty-eight and $\frac{75}{100}$ (38.75) dollars.

Judgment recorded October 11, A. D. 1897, in Book 39, at page 229.

23 (Title of Court and Cause.)

Clerk's Certificate to Judgment-roll.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

I, C. F. Curry, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in Judgment Book 39 of said court at page 229. And I further certify that the foregoing papers hereby annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 11th day of October, A. D. 1897.

[SEAL.]

C. F. CURRY, *Clerk,*
By N. E. MAISON,
Deputy Clerk.

(Title of Court and Cause.)

Defendant's Engrossed Bill of Exceptions.

Be it remembered, in the above-entitled action, that said cause came on regularly for trial on the 13th day of May, 1897, before the Hon. George H. Bahrs, sitting without a jury; Messrs. Platt & Bayne appearing for plaintiff, and Messrs. Chickering, Thomas & Gregory appearing for the defendant; whereupon the following proceedings were had:—

The plaintiff, to sustain the issues upon her part, intro-
24 duced in evidence the policy of life insurance mentioned in the complaint, which said policy was in words and figures as follows, to wit:—

"No. 517,750.

"Man's life. Five years' distribution policy of the Mutual Life Insurance Company of New York.

"Age, 29 years. Amount, $5,000.

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto Alphonsine McGrew, wife of Henri C. McGrew, at Honolulu, in the county of Oahu, State of Hawaiian islands, if living, if not living, to his executors, administrators or assigns, five thousand dollars, upon acceptance of satisfactory proofs at its home office of the death of said Henri G. McGrew during the continuance of this policy, upon the following condition; and subject to the provisions, requirements and benefits stated on the back of this policy, which are hereby referred to and made a part hereof:—

"Annual premium $113.50.—The annual premium of one hundred and thirteen dollars and fifty cents shall be paid in advance

on the delivery of this policy and thereafter to the company,
25 at its home office in the city of New York, on the fourteenth day of September, in every year during the continuance of this contract.

"In witness whereof, the said Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the fourteenth day of September, A. D. one thousand eight hundred and ninety-two.

"(Signed) RICHARD A. McCURDY, *President.*

"(Signed) A. S. GREEVE,
"*Acting Ass't Secretary.*

"The receipt of the first payment of premium hereon is acknowledged.

"W. G. EASTON, *Secretary.*"

The following provisions, requirements, and benefits are set forth on the back of said policy of insurance, to wit:—

"Payment of premiums.—Each premium is due and payable at the home office of the company, in the city of New York; but will be accepted elsewhere when duly paid in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance
26 of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract, shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company, except as hereinafter provided.

"Dividends.—This policy is issued on the five-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only five-year distribution policies in force at the end of such term, shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied, at the end of such period, in payment of future premiums on this policy, if requested in writing; or may then be drawn in cash. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected, in due form, not less than two years before the end of the first dividend period of five years; otherwise, a satisfactory examination will be required for each such application of the surplus.

"Paid-up policy.—After three full annual premiums have
27 been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount re-

quired by the provisions of the act of May 21, 1879, chap. 347, Laws of the State of New York.

"Surrender.—This policy may be surrendered to the company at the end of the said first period of five years, and eighty per cent. of the reserve computed by the American table of mortality and four and one-half per cent. interest, and the surplus, as defined above, will be paid therefor in cash.

"Incontestability.—It is hereby further promised and agreed that, after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are, that he shall pay the premium at the time and place, and in the manner stipulated in said policy, and that the requirements of the company as to age, and military or naval service in the time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

"Notice to the holder of this policy.—No agent has power, on behalf of the company, to make or modify this, or any contract
28 of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

"Assignments.—The company declines to notice any assignment of this policy until the original copy thereof shall be filed in the company's home office. The company will not assume any responsibility for the validity of an assignment."

And thereupon, the plaintiff rested upon the admissions in the answer.

The defendant, to sustain the issues on its part, thereupon introduced the following testimony, which, by stipulation of the parties, had been agreed to be true, subject to any objections thereto which might be made at the trial.

I.

That prior to February 8, 1894, one Charles L. Carter, of the Republic of Hawaii, was duly appointed the guardian of the person and property of one Henri G. McGrew, a person *non compos mentis*, and continued to hold and exercise such office of guardian at the date of filing the libel for divorce, and proceedings thereon, hereinafter mentioned.

II.

That on the 8th day of February, 1894, the said C. L. Carter, guardian as aforesaid, on behalf of the said Henri G. McGrew,
29 did file in the circuit court of the first judicial circuit of the Republic of Hawaii, a libel praying for a divorce from the said Alphonsine McGrew, on the ground of adultery of the said Alphonsine McGrew.

III.

That on the 8th day of February, 1894, the said Charles L. Car-

ter and the said Henri G. McGrew, and said Alphonsine McGrew were all domiciled in said Honolulu.

IV.

That on the 9th day of February, 1894, the said Carter and Henri G. McGrew, and Alphonsine McGrew, still being domiciled in said Honolulu, personal service was made on the said Alphonsine McGrew of a copy of the said libel, and a summons to appear and answer the same in the said circuit court of the Republic of Hawaii.

That the aforesaid libel was in the words and figures following, to wit:

"(Title of Court and Cause.)

"To the Honorable W. A. Whiting, first judge of the circuit court of the first circuit:

"Your libellant, Henri G. McGrew, a person *non compos mentis*, by his guardian, Charles L. Carter, respectfully represents:

"That he was legally and duly married to Alphonsine McGrew, defendant herein, on or about the 25th day of March, A. D., 1890, at Paris, France, and has conducted himself as a dutiful husband should, last living with said defendant as her husband in said Honolulu.

"That said defendant, regardless of her marriage vows and duty, within two years last past, has been guilty of adultery with one Dr. M. Miner, V. S., and one Mr. E. B. Pomeroy, and divers other men whose names are to your libellant unknown in said Honolulu, and also has been guilty of adultery within the last year past with divers men whose names are to your libellant unknown, in the city of San Francisco, State of California, one of the United States of America.

"That libellant and respondent have one child named Reynold Brodie, aged 3 years.

"That on the 23rd day of January, A. D. 1894, the said Henri G. McGrew, was, by the circuit court of the first circuit, found to be a person *non compos mentis*, and the said Charles L. Carter was appointed guardian of the person and property of said Henry G. McGrew.

"Wherefore, your libellant prays that defendant may be summoned to appear and answer this complaint at the next term of this court.

"That he may be divorced from the bonds of matrimony from said defendant.

"That the custody of said child may be awarded him.

"(S'g'd) HENRI G. McGREW,
"By his guardian, CHARLES L. CARTER.

"A. S. HARTWELL,
"CARTER & CARTER,
"*For Libellant.*

31 "HAWAIIAN ISLANDS, } ss:
Island of Oahu, }

"Charles L. Carter being duly sworn, deposes and says that he is guardian of Henri G. McGrew, a person *non compos mentis;* that affiant is definitely informed and believes, that he has good cause, and reason to believe, and does therefore aver upon his information and belief, that all matters and things set forth in the foregoing libel for divorce are proved.

"(S'g'd) CHARLES L. CARTER.

"Subscribed and sworn to before me this 8th day of February, A. D. 1894.

"(S'g'd) HENRY SMITH, *Clerk.*"

That thereafter, to wit: on February 21, 1894, the said plaintiff made the following motion in said court—

"(Title of Court and Cause.)

"*Motion for Attorneys' Fees.*

"Now comes Alphonsine McGrew, sometimes known as Sinette McGrew, the libellee in the above libel, and respectfully represents to the court that she has no private means of her own, and that she is desirous of contesting the said libel, and requires legal advice and assistance in the premises.

"And this libellee represents that she is advised by counsel, and is aware of her own knowledge, that her defense of the said libel
32 will involve an unusual amount of professional labor, particularly in the preparation of commissions and interrogatories and cross-interrogatories for witnesses residing in America, whose testimony will be essential to the proper and adequate defense of the said libel; and that in view of such fact, not only a liberal allowance for counsel fees, but also an allowance for general expenses liable to be required in the premises, should be made herein.

"Wherefore, this libellee moves the court here that the said guardian of the said Henri G. McGrew be ordered to pay to the counsel of this libellee such sums, as in the opinion of the court will be adequate, for the purposes herein set forth.

"Dated this 21 of February, 1894.

"(S'g'd) SINETTE McGREW.
"(S'g'd) C. W. ASHFORD,
"F. M. WAKEFIELD,
"*Counsel for Libellee.*

"HAWAIIAN ISLANDS, } ss:
City of Honolulu, }

"Alphonsine McGrew, sometimes known as Sinette McGrew, having been duly sworn, deposes and says that the matters of fact alleged in the foregoing instrument in support of the foregoing motion are true, of her own knowledge.

"(S'g'd) SINETTE McGREW."

(Duly verified.)

33 That, thereafter, the following petition was made in said court and cause:—

"(Title of Court and Cause.)

"*Petition for Temporary Alimony.*

"And now comes the said Alphonsine McGrew, libellee herein, by C. W. Ashford and F. M. Wakefield, her attorneys, and moves the court that an order be entered herein commanding the guardian of the libellant herein to pay to the attorneys of said libellee, for the use, support, and maintenance of said libellee the sum of twenty-five dollars ($25.00) per week, or such other sum as to the court shall seem just, by way of temporary alimony herein, and that such payments shall date from the 5th day of April, 1894.

"This motion is based upon the records and files herein, and upon the affidavit of C. W. Ashford, attached hereto and made a part hereof.

"Dated this 20th day of June, 1894.

"(S'g'd) C. W. ASHFORD,
"F. M. WAKEFIELD,
"*Attorneys for Libellee.*"

And thereupon the following order was made in said cause upon said petition:—

"(Title of Court and Cause.)

"*Order for Temporary Alimony.*

"Upon hearing the petition of said libellee for an order for the allowance to her of a sum for temporary alimony herein, and,
34 after argument by the counsel for the respective parties hereto,—

"It is ordered, that C. L. Carter, guardian of the said libellant herein, do pay to the attorneys for said libellee the sum of twenty — ($20) per week, as and for such alimony; the periods of such payments to begin with the 18th day of June, instant; first payment June 25th.

"Dated this 23rd day of June, 1894.

"(S'g'd) HENRY E. COOPER,
"*2nd Judge, First Circuit Court.*"

V.

That the said Alphonsine McGrew, named as libellee in said libel of divorce, upon whom such service was made, is the same person who is now the plaintiff in this cause.

VI.

That, under the law of the said Republic of Hawaii, the said circuit court is a court having jurisdiction to entertain libels for divorce and to issue summons to libellees named in any libel filed in such court.

VII.

That the said Henri G. McGrew died at Honolulu on the 22nd day of October, 1894, having been continuously within the jurisdiction of said court since the filing of said libel and service of
35 libel and summons on the said libellee, and was domiciled within the jurisdiction of the said court at the time of his death, aforesaid.

VIII.

That, on the 11th day of April, 1894, the said Alphonsine McGrew demurred to the said libel, on the ground that the said Henri G. McGrew was *non compos mentis*, and that said Carter, guardian as aforesaid, had no authority to bring a libel for divorce on his behalf.

IX.

That thereafter, joinder was made by the libellant in said demurrer, and on May 19th, 1894, said demurrer was duly argued before the said circuit court.

X.

That on June 1st, 1894, by consent of parties, the said court, reserved to the consideration and decision of the supreme court of the Republic of Hawaii, the sufficiency of said demurrer.

XI.

That on July 31st, 1894, an opinion and decision was duly rendered by the said supreme court upon the said reserved question concerning the said demurrer, holding that the demurrer was not well taken.

XII.

That on the 6th day of August, 1894, in pursuance of said
36 opinion of said supreme court, the said circuit court overruled the said libellee's said demurrer.

XIII.

That on the 10th day of August, 1894, the said libellee, by C. W. Ashford, her attorney, filed an answer in the said divorce case, denying all the allegations of the libel.

XIV.

That on the 18th and 20th days of August, 1894, the said divorce case was heard by the said circuit court, and, after production of evidence by both parties and argument by counsel, on the 23rd day of August, 1894, a decision was rendered by the said circuit court granting the prayer of the said libel of the said Henri G. McGrew against the said Alphonsine McGrew on the ground of the adultery of the said libellee.

XV.

That on the 24th day of August, 1894, an order was signed by Henry E. Cooper, judge of the said circuit court, presiding at said circuit court, in said divorce suit, ordering a decree of divorce to be entered in favor of said Henri G. McGrew against the said Alphonsine McGrew on the ground aforesaid.

XVI.

That on the said 24th day of August, 1894, a decree of di-
37 vorce was signed by the said Henry E. Cooper, as judge of the said circuit court, which said decree was as follows:—

"(Title of Court and Cause.)

"*Decree of Divorce.*

"The above-entitled cause came on for hearing before the Hon. H. E. Cooper, 2nd judge of the said first circuit court, on Saturday, the 18th day of August, A. D. 1894, and afterwards by adjournment on the 20th and 21st days of said August, and, after hearing and considering the evidence adduced and the arguments of counsel, as well for the libellant as for the libellee, it was, on the 24th day of said August, ordered by the said Hon. H. E. Cooper that a decree of divorce from the bond of matrimony be entered in favor of the said Henri G. McGrew, for the cause of the adultery of the said Alphonsine McGrew.

"Wherefore, it is ordered, decreed, adjudged, and considered by the court here, that the said libellant, Henri G. McGrew, be, and hereby is, divorced from the bond of matrimony heretofore formed and entered into between him, the said Henri G. McGrew, and her, the said Alphonsine McGrew.

"By the court:

"(S'g'd) HENRY SMITH, *Clerk.*

"Honolulu, August 24th, 1894."

38 XVII.

That J. O. Carter, of said Honolulu, is the duly appointed administrator of the estate of Henri G. McGrew, deceased, and that as such administrator he brought suit, after the death of said Henri G. McGrew, in the courts of the Republic of Hawaii, against the said Mutual Life Insurance Company upon the same policy of insurance which is the subject of this suit, and recovered judgment thereon, which judgment was sustained by the supreme court of the Republic of Hawaii, and a motion for rehearing of said cause, made by the said Mutual Life Insurance Company, was denied by the said supreme court, and the said Mutual Life Insurance Company of New York, thereupon paid to said J. O. Carter, administrator as aforesaid, the full amount of the $5,000 due by the said company upon said policy of insurance, and the said J. O. Carter thereupon executed to the said company a full receipt and release of all claim on account

and by reason of the said policy, and delivered said policy to said insurance company.

The introduction of which said testimony, appearing in the paragraph designated XVII heretofore, was objected to by counsel for plaintiff upon the ground that the same was incompetent, irrelevant, and immaterial, which said objection was by the court sustained, and an exception allowed said defendant, which said exception is hereby designated exception No. 1.

39 XVIII.

That a volume entitled "Compiled Laws of the Hawaiian Kingdom," and known as "Compiled Laws of 1884;" and a volume entitled "Laws of Her Majesty Kiliuokalani, Queen of the Hawaiian Islands, passed by the Legislative Assembly at its session, 1892," and known as "Session Laws of 1892;" and also volumes I to IX of the "Reports of Decisions Rendered by Supreme Court of the Hawaiian Islands," are each published by authority, and are received and used in the courts of the Republic of Hawaii as evidence of the laws of said republic.

That by section 1331 of the aforesaid Compiled Laws of the Hawaiian Kingdom, which said law was in force at the time the aforesaid action for divorce was commenced, and at all times subsequent thereto, up to the 12th day of May, 1896, it was provided:—

"When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall have been issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the courtesy; provided, that the court may make such reasonable provision for the divorced wife,
40 out of any real estate that may have belonged to her, as it may deem proper."

XIX.

That the supreme court of the Hawaiian islands is the court of appellate jurisdiction of said republic, and the opinions of said court, in said actions of McGrew *v.* McGrew, and Carter *v.* Mutual Life Insurance Co., and the opinion rendered upon the motion for rehearing in the last-named case, are the opinions reported in the aforesaid Hawaiian reports, under the respective titles of said cases.

The plaintiff made a separate objection to each of the paragraphs 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 19, and also that portion of paragraph 18 relating to section 1331 of the Compiled Laws of the Hawaiian Kingdom. The said objections were made upon the ground that the said matter, and all of it, was incompetent, irrelevant, and immaterial, which said objections were all overruled by the court, and an exception in each case allowed said plaintiff.

The defendant here rested.

The plaintiff thereupon introduced in rebuttal the following testimony which, by stipulation, had been agreed to be correct, subject to any objections thereto made at the trial:—

41 I.

That on the 27th day of August, 1894, the libellee, by C. W. Ashford, her attorney, filed an exception to the said decree, and gave notice that the said libellee would carry her exceptions to the supreme court from the said decree of the said circuit court; which notice was in accordance with the rules of the said circuit court, and was filed in said circuit court, within the time by the said rules allowed for filing said notice.

II.

That on the 1st day of October, 1894, the libellee's bill of exceptions in said divorce case was filed in the said circuit court by her attorney, C. W. Ashford, within the time prescribed by law, but without the allowance of the same by the said judge of said circuit court, or any judge; and that said bill of exceptions is still on file in said cause in said circuit court, and has not been certified, settled, signed, or allowed by said circuit court, or by any judge thereof, or otherwise perfected and removed into the supreme court, or removed from or out of said circuit court; and that said exceptions have not yet been directly heard, determined, or disposed of, in or by any court of the Republic of Hawaii.

The said bill of exceptions was in the words and figures following, to wit:—

42 "HAWAIIAN ISLANDS:

"In the Circuit Court for the First Circuit, August Term, 1894.

"HENRI G. MCGREW, by CHARLES L. CARTER, His Guardian, Libellant,
vs.
"ALPHONSINE MCGREW, Libellee.

"*Libellee's Bill of Exceptions.*

"Be it remembered that, on the 20th day of July, 1894, the decree of the supreme court was filed in this cause, wherein and whereby the demurrer of the libellee to the authority of libellant's guardian to maintain this suit was overruled.

"And that, on the 30th day of said July, said libellee filed herein her motion for an order to the libellant to furnish her with specifications of the charges of adultery alleged in the said libel herein, together with a notice of hearing of said motion, at 10 o'clock, on the 31st day of said July.

"That said motion was not heard at the time so noticed, for the reason that the counsel for libellant induced the counsel for the libellee to forego presenting the same, by promising that he,
43 the counsel for libellant, would, as soon as practicable, furnish the specifications requested in said motion.

"That on the third day of August, 1894 (on which date libellee's counsel had again notified counsel for libellant to appear upon said motion for specifications, owing to the same not having been then

furnished to libellee), it was further agreed between counsel herein, that said motion would not be opposed, and that such specifications as requested therein would be furnished to libellee, without any order therefor.

"That on the fourth day of August, 1894, counsel for libellant further agreed to furnish such specifications during said last-mentioned day (if possible), but did not furnish the same, or any specifications herein, until the 6th day of August, on which last-named date, libellant's counsel served libellee's counsel with, and filed, the specifications marked as filed herein on said date.

"That on the 7th day of said August, counsel for libellee filed and served libellant's counsel with a copy of libellee's exception to the specifications, so, as above, furnished and filed herein, together with a motion for an order for the giving of further specifications in the premises, and notice of a hearing on said motion at 10 o'clock on the 8th day of said August.

"That said last-mentioned motion was not presented and
44 argued at the time last aforesaid, or at all, for the reason that libellant's counsel, upon being served with notice thereof, undertook and agreed to and with libellee's counsel, to furnish further specifications of said charges, as requested in said last-mentioned motion, without an order of the court in the premises.

"That on the 9th day of said August, in the afternoon of said day, counsel for libellant served libellee's counsel with, and filed, the amended specifications on said charges, now on file herein.

"That on the 10th day of said August, libellee filed, and served libellant's counsel with a copy of her answer to the libel herein, and in like manner filed, and served a copy, of her motion for a commission or commission to take the testimony of said libellee, and of the person with whom, in said libel and specifications, libellee was charged to have committed adultery, viz: M. L. Miner and E. B. Pomeroy, all of whom, as shown by the record herein, were then residing abroad, and the last two named of whom had not been in Hawaii since the filing of the libel herein, and that notice for hearing of said motion for such commissions, at 10 o'clock on the 11th day of said August was, at the same time, served upon counsel for libellant.

"That on the said 10th day of August, counsel for libellant filed and served their motion to set this cause for trial, together with notice of hearing of same at 10 o'clock on said 11th day of August.

45 "That libellant's said motion to set the cause for hearing, and libellee's said motion to issue such commissions, as aforesaid, came on for hearing together before Judge Cooper of said court, on said 11th day of August, whereupon the court overruled said motion to issue, such commissions, and refused to issue, or to oder the same or any commission as in said motion requested, and granted said motion to set the cause for trial; and set the same for hearing and trial on the 18th day of said August; and that libellee, by her counsel, duly excepted to the order so overruling her said motion for commissions to take testimony abroad, and to the order setting

said cause for hearing, without having obtained the testimony of said Miner and Pomeroy.

"That the hearing of said cause, in pursuance of said order setting the same, came on before the said judge on the said 18th day of August, and was thence continued to the 20th, and thence to the 21st day of said August, on which last-named date, (the hearing and argument having been concluded), reserved its decision and judgment herein.

"That on said hearing, the libellant's counsel called to the stand one Marie, or Mary Silva, a child of 13 years, who, upon being examined touching her competency as a witness, and her understanding of the nature of an oath, gave answer as per the transcript thereof at pages 28, 29, 30, and 31 of the evidence herein; and counsel for libellee objected to her being sworn as a witness herein, on the ground that she was incompetent as a witness, in not understanding the nature of an oath. But the court overruled said objection, and libellee, by her counsel, excepted.

46

"That on the 23rd of August, the court rendered its decision in favor of libellant herein, and that on the 24th day of said month, a decree of divorce, as filed herein, was made and entered, to which libellee, by her counsel, on the 27th of said August, filed her exceptions.

"And libellee alleges in particular, that said decree is not warranted by the law and the evidence adduced herein; and that no legal evidence was adduced to prove a legal marriage of the parties hereto, but that, on the contrary, the evidence showed no marriage which, at the time and place of its alleged celebration, was valid by the law of the nation in which it is alleged to have been celebrated, to wit: the Republic of France. And that no sufficient evidence was adduced upon which to base a decision, or finding, that any charge of adultery, alleged against said libellee in said specifications, had been proven herein.

"All records, files, exhibits and papers herein, and the transcript of the evidence adduced at said hearing and signed by the stenographer, are hereby expressly referred to and made a part of this bill of exceptions.

47

"Wherefore, and for the errors of the trial court herein, the libellee submits that the said libel should be dismissed, for want of evidence of the marriage alleged in said libel; and for want of sufficient evidence of any of the offenses charged against libellee therein; or, in the alternative, that said decree should be vacated, and a new trial ordered, for the error of said court, in refusing to order, or allow commissions to take the testimony of persons residing abroad, and to testify, as a wi ness herein, the said Marie, or Mary Silva.

"Dated this 1st day of October, 1894.

"(Signed) C. W. ASHFORD,
"*Attorney for Libellee.*"

"I allow this bill of exceptions, this — day of October, 1894.

——— ———,
"*Judge First Circuit Court.*"

The defendant objected to the introduction of the said bill of exceptions, upon the ground that the same was incompetent, irrelevant, and immaterial to any issue involved in this case, and upon the further ground, that the court of last resort in Hawaii had already passed upon the finality of said judgment; which objection
48 was overruled, and an exception allowed said plaintiff; which said exception is hereby designated exception No. 2.

III.

That the judge who tried said cause, to wit: Henry E. Cooper, was absent from the Republic of Hawaii on the 1st day of October, on which day the said libellee filed her bill of exceptions in said cause, and did not return to the Republic of Hawaii until the 25th day of October, 1894, the said libellant, Henri G. McGrew, having died on the 22nd day of October, 1894.

That said Henry E. Cooper resigned his office as judge of said circuit court on the 6th day of November, 1895.

IV.

That, on the 11th day of January, 1897, the said Alphonsine McGrew, by her attorney, A. S. Humphreys, made a motion in said supreme court to place the said exceptions on the calendar of said supreme court for consideration, and that the court proceed to hear the same.

Said motion, and the affidavit of C. W. Ashford, thereto attached, are as follows:

"(Title of Court and Cause.)

"*Motion.*

"And now comes the defendant in the above cause, and
49 moves this honorable court to place said cause upon the calendar of this court; to settle and allow the bill of exceptions filed in said cause, and to proceed to hear said cause upon said bill of exceptions, when so settled and allowed. This motion is based upon defendant's bill of exceptions filed in said cause, and upon the several pleadings and papers filed therein, and more particularly upon the affidavit of C. W. Ashford, filed herewith and attached hereto.

"(S'g'd) ABRAM STEPHANUS HUMPHREYS,
"*Attorney for Defendant.*

"(Title of Court and Cause.)

"*Affidavit of Clarence W. Ashford.*

"STATE OF CALIFORNIA, }
"*City and County of San Francisco,* } *ss:*

"Clarence W. Ashford, having been duly sworn, deposes and says:—

"That he was attorney of record for the above-named libellee, in

the defense of the above-entitled suit, and, as such attorney, had charge of the defense thereof, and personally appeared therein and conducted the same from time to time, from the institution of said suit to the death of said Henri G. McGrew, on or about Oct. 22nd, 1894.

"That, as such attorney, this deponent presented to, and filed with the clerk of said court, within the time prescribed there-
50 for by law and by the stipulation of parties on file herein, a bill of the exceptions noted by or on behalf of said libellee to the rulings of said court upon and during the trial of this cause, and to the decree signed by said court, and on file herein.

"That, at the date of the filing and of said bill of exceptions, the judge before whom all the proceedings in this cause had been had, and who had held the trial, and signed the decree herein, viz: the Honorable Henry E. Cooper, was absent from the Hawaiian islands, on a visit to the State of California, and did not return to the Hawaiian islands until after the death of said Henri G. McGrew. That, during the said absence of said judge, the supreme court of the Hawaiian islands refused an application by the attorney and guardian of said libellant, to place the exceptions above mentioned upon the calendar for hearing at the September, 1894, term of said supreme court, then in session, and ruled, in effect, that said exceptions could not be perfected or duly certified until the return to Hawaii of said judge who had tried said cause.

"That, for the reasons above set forth, this deponent felt he had done all things incumbent upon him in the premises, to bring said exceptions up for review by said supreme court, and felt that noth-
ing remained for him to do in the premises, except to await
51 the return of said judge, Henry E. Cooper, which deponent accordingly did.

"That, on or about the 23rd day of October, 1894, this deponent met Charles L. Carter, the attorney and guardian of said libellant, in the office of the clerk of this court, when said Carter filed a suggestion, or an affidavit, of the death of said libellant; that deponent then conferred with said Carter concerning the status of this cause as affected by the then recent death of said libellant; and that, in said conversation, said Carter agreed with this deponent that nothing remained to be done in said cause, for the reason that the subject-matter of the suit, to wit: the marriage theretofore existing between the parties hereto, had been dissolved by the death of said libellant, and that the authority of said Carter to act in the premises as guardian of said libellant had also been thereby dissolved and terminated, and that there was no one *in esse* with authority to take or resist any further action in the matter on behalf of said libellant, and that the suit itself was terminated, for the want of parties, and because of the dissolution and extinction of the subject-matter thereof, to wit: the status theretofore existing between the parties hereto.

"That, thenceforward to the time of the death of said Carter, it

was understood by this deponent (and, also, as he believes,
52 by said Carter), and was tacitly agreed between them, that said suit was absolutely terminated, and that it had been abated, beyond the power of revival, by the death of said libellant; and that this deponent so continued to believe, thence, to the present time, and still so believes.

"And so deponent sayeth, for the reasons above set forth, he took no further steps to bring said exceptions before said supreme court, after the filing of the bill of exceptions as above described. And further, deponent sayeth not.

"(S'g'd) CLARENCE W. ASHFORD.

"Subscribed and sworn to before me, this 30th day of October, 1895.

"(S'g'd) N. E. W. SMITH,
"*Notary Public.*"

The defendant objected to the foregoing motion, and also to the foregoing affidavit, on the ground that the same are incompetent, irrelevant, and immaterial, which objection was overruled by the court, and an exception allowed said defendant, which exception is hereby designated exception No. 3.

V.

That, at the time the bill of exceptions was presented, as aforesaid, the following rule of practice of the said circuit court of the Hawaiian islands was in force, to wit;—

53 "Bills of exceptions are to be presented to the judge who presided at the trial, within the time prescribed by law, and in case of his absence, they may be filed with the clerk, whose duty it shall be to present the same at the earliest opportunity, and he shall endorse thereon the day and hour of filing. Upon the presentation or filing of a bill of exceptions, counsel shall at once notify adverse counsel, who shall have five days in which to propose amendments to the bill, which shall be presented to the judge, or filed with the clerk, as above provided, and notice shall be given to the adverse party. Either party may signify his approval of, or consent to, bills of exceptions and amendments thereto, by endorsing the same on such bill or amendment."

The defendant objected to the introduction of the aforesaid rules of practice, upon the ground that the same were incompetent, irrelevant, and immaterial, in that the supreme court of Hawaii had already passed upon their applicability to the present case, and that their decision is conclusive upon this court.

The objection was overruled, and an exception allowed defendant, which exception is hereby designated exception No. 4.

The plaintiff thereupon introduced in evidence the following portion of the "Compiled Laws of Hawaii," which said law was
54 in force at all the times since the commencement of said divorce action, and is now in force. It is as follows:

"Any party aggrieved by any order or decision of the circuit court

may except thereto, and his exceptions shall be duly noted, and certified to the supreme court, and no order or decree for a divorce shall be made absolute, until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the supreme court, sitting *in banco*, and if the court *in banco* shall be of opinion that the order or decision excepted to in said circuit court was erroneous, they shall so certify, and thereupon, the case shall be heard anew."

The defendant objected to the introduction of the law last aforesaid, upon the ground that it was incompetent, irrelevant, and immaterial, because the supreme court of Hawaii had already passed upon the finality of this divorce decree, which said objection was overruled, and an exception allowed defendant, which said exception is hereby designated exception No. 5.

ALPHONSINE McGREW was thereupon called, and testified as follows:

I was the wife of Henri G. McGrew, living in Honolulu.

Q. When did you last reside there?

A. I left Honolulu on the 5th day of April, 1894.

55 To which answer counsel for defendant objected, and asked that the same be stricken out on the ground that it was not responsive, and immaterial, irrelevant, and incompetent to any issue involved in the pleadings of this case; which objection was by the court overruled and exception noted, hereby designated as exception No. 6.

I did not come to California for the purpose of getting a divorce from my husband.

Thereupon, counsel for defendant objected to any testimony as to the evidence of the change of residence on the part of Mrs. McGrew prior to her husband's death, upon the ground that her domicile remained that of her husband, which objection was by the court overruled and exception noted, hereby designated as exception No. 7.

Witness continuing: We came to California in 1893, for my husband's health and returned there on the 20th December of that year. Mr. Carter met us at the steamer. He said he had been appointed the guardian of my husband. I had a home in Honolulu. When we came here to California, our home was rented, but the party left before we got back. I wanted to go to my house, but Mr. Carter refused to let me go in. It was closed and he had the key.

56 He said for me to go to the hotel. When I went to the hotel, the papers were served on me, and they told me they wanted to take my husband to the hospital, that he was *non compos mentis*, and that he would perhaps get better. He had softening of the brain. Although he knew what was going on, after his father spoke to him, he decided to go to the hospital for a few days. I was left in the hotel with my child; no money, no home. Friends of mine asked me to go and live with them. I staid with them until the 5th of April, when I had to leave Honolulu. I thought my child would

be taken away from me. After my husband was taken to the hospital, I asked to go to my home. I was not allowed by Mr. Carter to enter my home there. My husband wanted to go with me to our home that we had occupied before, but Mr. Carter would not let him go. Mr. Carter left my husband with me for a few days, and then took him to the hospital. Mr. Carter sold everything in my home, and only allowed me a piano. He would not allow me that only because it was mine, and he could not keep it. I sold my piano and with the money paid my passage to this city.

Q. Please state why you left Honolulu?

Mr. GREGORY: I object to that question as immaterial, irrelevant, and incompetent.

The COURT: The objection overruled.

57 To which ruling an exception was duly noted, which is hereby designated as exception No. 8.

A. I left Honolulu because I had no home and was afraid they would take my child away from me.

Q. When you left Honolulu, will you please state what was your intention as to returning in time?

Mr. GREGORY: I object to the question as incompetent, irrelevant, and immaterial, because she was a married woman at that time and her intentions as to her domicile was of no importance, since her domicile remains that of her husband, and she has already testified that she did not leave Honolulu for the purpose of divorce proceedings.

Which objection was overruled and an exception noted, hereby designated as exception No. 9.

A. My intention was to come up here and make my home.

WITNESS continuing: The divorce suit had been commenced before I left Honolulu. I have resided in San Francisco ever since I landed here in April, 1894, and I have not been back to Honolulu.

Cross-examination:

I went to Honululu in May, 1890, and resided there con-
58 tinuously until the 5th day of April, 1894, although I was temporarily here with my husband in the meantime. I left there in May, 1893, with my husband, and returned to Honolulu on December 22, 1893. We came here for the purpose of his health. He was a practicing physician there. He had lived there all his life, with the exception of the time when he was away at college.

Q. He had been a kind and indulgent husband with you, and had always provided you with a comfortable home in Honolulu, had he not?

Mr. PLATT: We object to that question as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

To which ruling an objection was noted, hereby designated as exception No. 10.

Q. Did your husband ask you not to leave him?

Mr. PLATT: We object to that question as incompetent, irrelevant, and immaterial.

The COURT: Objection sustained.

To which ruling an exception was noted, hereby designated as exception No. 11.

Q. Did the guardian himself, at any time, ask you to leave the hotel?

A. No, sir.

Q. Had there been any estrangement between the doctor's family and yourself before you left Honolulu, on April 5, 1894?

59 Mr. PLATT: I object to that question as incompetent, irrelevant, and immaterial.

The COURT: The objection is sustained.

To which ruling an exception was noted, hereby designated as exception No. 12.

A. I don't know whether Mr. Carter told me, at the time he met us at the wharf, that he had been appointed the guardian of my husband or not. My husband remained at the hotel with me for a few days, and then was taken away by Mr. Carter. Mr. Carter said that he was my husband's guardian, and that he needed care, and should be taken to the hospital. He was not taken to an asylum, but to a hospital. I knew then that he was a sufferer from softening of the brain. I have been in California ever since I left Honolulu, although I intended to go to Florida for a short visit. I would like to pay my parents a visit, and was also invited to go to New Orleans. I would like to make my parents a visit in France, but have to come back here again. I am not engaged in any business or profession. My home is No. 212 Powell street, San Francisco.

Q. Why was it that you stayed in San Francisco when you came from Honolulu?

A. Why, as I did not have the money with which to visit France, I then wanted to make my home here.

60 Q. Did you not state, Mrs. McGrew, in your deposition formerly taken in this case, as follows: "Will you state what was your object, if any, in leaving Honolulu at that time? A. I left Honolulu because I was afraid I could not keep my child." Did you so testify?

A. Yes. The first thing was that I had no home.

Q. Did you ask the court to pay you any money in the divorce action which was pending in Honolulu?

A. I do not know, sir. I do not understand. I received no money, and lived with friends.

Q. In this divorce action which was brought against you by Mr. McGrew, was no money paid you during the progress of the litigation?

A. I think for about two or three months some little money was sent to me.

Q. They sent it for you?

A. No, for the child. They sent it to me here, after I left Honolulu. I received no money there.

Q. Did you ever make any application to your husband personally to come and live with you?

A. Why, my husband was not allowed even to see me. I went to see him. He was then in the hospital.

Q. The question is, if you made any application to him to go and live with you?

A. He didn't understand.

61 He knew me, and he knew his child, because he often asked me what he was doing in the hospital. I asked him if he could understand, and if he knew he had brought an action of divorce against me, but he did not understand; he did not know. I asked him to come and live with me again, but he didn't understand.

Q. And you say he didn't understand you?

A. Well, I asked him if he knew he could understand me. I said, "Will you come with me?" He answered he would come with me, but he didn't understand why he had to stay in the hospital.

Q. Did you make any application to Mr. Carter for money?

A. Yes, sir; but he said he had no money of my husband's.

Q. Do you know whether Mr. Ashford made any application for money for you?

A. I do not know.

Q. Did you ask Mr. Carter to give you a house in Honolulu to live in?

A. No, sir; I asked him to give me back my own home, there.

Q. Did you ask him to give you a home?

A. He would not do so.

Q. Did you ask him?

A. Yes, sir. When he took my husband, I asked him where I was to go, and he said anywhere I liked. I asked him if I ought not to

62 have a home to take my child to. He answered that he could not do anything for me. The family of Dr. McGrew and myself have not spoken for a long time. The house in which my husband and I had lived was a rented house. I have not carried on any correspondence with my husband's family since I left. I asked him to come and live with me, because I wanted to take care of him, and have him with me; he was my husband. Mr. Carter, the administrator, asked me to give up the child, and said he would give me enough money to go to Europe to my parents; and I said they could keep the money and I would keep my child. This is the only child my husband and I ever had.

Redirect examination:

Q. Did you bring this policy of insurance with you when you came up from Honolulu?

A. I did not have it; Mr. Carter had it. He took it out of my husband's safe, while we were in Honolulu. I objected, and told him he had no right to take anything that was in the house; that

they belonged to my husband. He said, at the time, that he was the doctor's guardian. I got about $300 from the court for the support of my child in three years.

Recross-examination:

Q. Did you have any home in San Francisco at the time you left Honolulu to come here?

A. No, sir.

63 Q. What made you think that you could get a home here in San Francisco?

Mr. PLATT: I object to that question, as immaterial and irrelevant. She said she came up here to make her home.

The COURT: The objection will be sustained.

To which ruling an exception was noted, hereby designated exception No. 13.

Q. You say the reason why you left Honolulu was because you had no home there?

A. No; I had no home there.

Q. Did you go out in Honolulu and try to rent a house to live in?

A. No.

Q. Did you go to the hotel and ask them to send the board bills to your husband?

A. Mr. Carter came out in the paper that nothing was to be delivered to me—not to give me any credit.

Mr. GREGORY: I ask that the answer of the witness be stricken out as not responsive, and on the further ground that a notice inserted in the paper by Mr. McGrew that he would not be liable for credit extended to his wife, is of no effect.

The COURT: They affect her mind, and the condition of her mind is material.

To which ruling an exception was duly noted, hereby designated exception No. 14.

64 Witness continuing: Mr. McGrew and I were married in Paris, in 1890.

The defendant, in surrebuttal, introduced the following testimony:

That, on the 2nd day of October, 1894, C. L. Carter, as the guardian of Henri G. McGrew, a person *non compos mentis*, did, in the said divorce action of McGrew *v.* McGrew, file a motion in the supreme court of Hawaii, requesting that the exceptions theretofore filed on the 1st day of October, be put on the calendar of the said supreme court for hearing.

That the said C. L. Carter then and there offered to waive the facts that the said bill of exceptions had not been allowed by the said trial judge on the 2nd day of October, he being then absent from the Republic of Hawaii, which motion was opposed by the said C. W. Ashford, attorney for the said Alphonsine McGrew.

That on the 4th day of October, 1894, the said supreme court

overruled the motion of said Carter to put the said divorce proceedings on the calendar for hearing, on the ground that no bill of exceptions has been signed by the judge presiding at the trial of the libel for divorce.

That said bill of exceptions were never allowed by the judge presiding at the term of said circuit court, who heard the trial of the said libel for divorce, nor by any other judge of said court, or
65 any court, up to the present; nor has any request, or attempt, ever been made for such allowance.

That on the 27th day of said January, 1897, the said supreme court refused to place said bill of exceptions on the calendar of said supreme court, for the reasons set forth in the opinion of the said circuit court, then rendered, which said opinion was as follows:

"(Title of Court and Cause)

"*Motion to Place on Calendar.*

"Submitted January 19, 1897; decided January 27, 1897.

"Frear and Whiting, J. J., and Cecil Brown, Esq., of the bar, in place of Judd, C. J., disqualified.

"Motion to place cause on calendar and settle bill of exceptions denied, the bill not having been refused allowance by the trial judge.

"Opinion of the court, by FREAR, *J.*:

"Opinion of the court, by WHITING, *J.*:

"This is a motion made on behalf of the libellee, to place this cause on the calendar, to settle and allow a bill of exceptions filed in the cause in the circuit court, and to hear the cause on the bill of exceptions, when settled and allowed. The motion is
66 based on the record and an affidavit by defendant's former counsel, C. W. Ashford. We find nothing material to the case in the affidavit. The record shows that libellant's former counsel moved this court, on October 3, 1894, to place this bill of exceptions on the calendar; that the motion was opposed by libellee's said former counsel; and that the court denied the motion. We do not see that the situation has changed materially then, excepting that now a much longer time has elapsed without any attempt having been made on the part of the libellee, or her counsel, to take the necessary steps to have her bill of exceptions allowed and disposed of; and that, too, though this court held (*ante*, p. 117), as long ago as August 15, 1895, that the death of the libellant did not prevent further action from being taken on the exceptions. It is true, that the judge who originally tried the cause has since resigned from the bench,—though this does not appear from the record or affidavit. But he did not resign until over a year after the bill of exceptions was prepared, and no excuse has been shown for the failure to get the bill allowed by him, or, if possible, by his successor, and no refusal to allow the bill has been shown, so as to au-

thorize this court to allow it as provided by section 74, ch. 57, Laws of 1892.

"The motion is denied.

"A. S. Humphreys, for the motion.

"Kinney & Ballou, *contra*."

67 That the opinion and decision rendered in the said divorce action of McGrew *v.* McGrew was as follows, to wit:

"(Title of Court and Cause.)

"*Decision.*

"The point upon which this matter was taken under consideration was, as to the sufficiency of the proof of marriage.

"There is a difference in the evidence required to prove a marriage between civil and criminal cases; the presumption of innocence in criminal cases requires that the marriage, like other facts, should be fully proved, there being no presumption in favor of marriage; while in civil cases, such a presumption exists where the parties have lived in the marriage state.

"It was contended for by the libellee that a proceeding of this kind is criminal in its nature and that the same rules must govern as in a criminal case.

"A libel for divorce, which charges adultery, is in the nature of a criminal action, but the authorities seem to hold that, although it is necessary in order to grant the decree in a case of this kind to find that the respondent has been guilty of a crime, yet the case is so far civil as to only require a preponderance of evidence to prove the facts upon which to found the decree.

"See Smith *v.* Smith, 5 Or. 187;

"Chestnut *v.* Chestnut, 88 Ill. 548.

68 "Granting that there is no presumption in favor of marriage in a proceeding of this kind, and that it must be proved like any other fact, I think that the evidence in this case is adequate.

"The law of France provides that, in order that a marriage may be legal, it must have been solemnized before the civil authority after the publication of bans, and without this, no marriage by the church, is of any validity.

"The testimony of Mrs. Neumann was to the effect that she was present, and saw the 'Catholic ceremony in a church,' and afterwards attended the nuptial mass; that the marriage had to wait an hour for Henri McGrew to return with the papers that he had forgotten, 'those were the papers of the law, the marriage by the mayor or judge;' that she 'saw him hand the papers to the priest.' This was competent evidence, and, to my mind, sufficient to support the allegation or marriage.

"As to the charges of adultery: without discussing the particulars of the testimony, I find the act to be proven in the instance where Mr. Pomeroy was discovered upstairs with Mrs. McGrew in her bed-room by Mary and Sylvana. The presence of a

companion at this time is not sufficient to overcome the presumption of guilt arising under the circumstances detailed by the witnesses. I also find the proof to be sufficient
69 in the two instances at the office of Dr. Miner at the hotel stables; the admitted denials of the correspondents being, in my opinion, outweighed by the testimony of Mary in one case and Sylvana in the other, they being corroborated by the witness Ladd. The other acts, although not fully demonstrating the guilt of the parties, yet are clearly supporting in their nature and make an overwhelming preponderance in favor of the libellant.

"The decree is granted on the ground of adultery.

"Dated Honolulu, Aug. 23rd, 1894.

"(S'g'd) HENRY E. COOPER,
"*2nd Judge Circuit Court, First Circuit.*

"A. S. Hartwell and Carter & Carter, for libellant.
"C. W. Ashford, for libellee."

The plaintiff objected to the introduction of the foregoing decision as well as the foregoing opinion of the supreme court on the motion to place cause on the calendar, upon the ground that the same was incompetent, immaterial, and irrelevant, which objections were each overruled and an exception in each case allowed said plaintiff.

That the foregoing was all of the evidence offered on said
70 trial. The said cause was thereupon argued and submitted to said court, and the said court thereafter made and filed its decision herein in favor of said plaintiff, and against the said defendant, in accordance with the prayer of said complaint, which said decision is hereinbefore set forth; and the defendant now specifies the following particulars wherein the said evidence is and was insufficient to justify said decision:—

I.

The evidence is insufficient to justify that portion of the finding designated 1, in said decision hereinbefore set forth, wherein it is stated that this defendant made, executed, and delivered to Henri Golden McGrew a certain policy of insurance, wherein and whereby this defendant promised and agreed to pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand (5,000) dollars, upon the death of Henri Golden McGrew.

On the contrary, the evidence shows that the said defendant promised and agreed, by said policy, to pay unto the said Alphonsine McGrew, as the wife of Henri Golden McGrew, and not otherwise, the sum of five thousand dollars.

II.

The evidence is insufficient to sustain that portion of the finding designated 4, in said decision hereinbefore set forth, wherein it is stated that this defendant has never paid the said sum of five
71 thousand (5,000) dollars, or any part thereof, due on account of said policy.

On the contrary, the evidence shows that the said defendant has paid the same, and the whole thereof.

III.

The evidence is insufficient to sustain that portion of the finding in said decision hereinbefore contained designated 8, wherein it is stated that this plaintiff, on the 5th day of April, 1894, left the Hawaiian islands with the intention of not returning to said islands, but of coming to the State of California, and making her home in, and permanently residing in, said State, and with said intention has made her home in said State, and has continuously resided in said State with such intention, and on the 23rd and 24th of August, 1894, was actually in, and residing in, said State with the intention of permanently residing and making her home in California.

On the contrary, the evidence shows that said plaintiff did not leave the Hawaiian islands with the intention of not returning thereto, and did not leave the Hawaiian islands on said date, or at any time, for the purpose of permanently residing in the State of California, and on the 23rd and 24th days of August, 1894, was not actually residing in said State with the intention of permanently residing therein.

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IV.

The evidence is insufficient to sustain the finding designated 9, to the effect that, prior to the 5th day of April, 1894, this plaintiff had been excluded by such guardian from the home of said Henri Golden McGrew, and was by him prevented from returning to, and has never since been allowed to return to the same, and was, on the said 5th day of April, 1894, excluded from said home by such guardian.

On the contrary, the evidence shows that this plaintiff was not excluded by the said Charles L. Carter, as such guardian, or otherwise, from the home of said Henri Golden McGrew, and that said Henri Golden McGrew did not have a home at said times, at said islands; and that said plaintiff was not, by said Charles L. Carter, excluded from the said, or any home.

V.

The evidence is insufficient to sustain the finding designated 10, in said decision hereinbefore contained, to the effect, that on the said 5th day of April, 1894, this plaintiff had no home, and has never since had a home, in the Hawaiian islands.

On the contrary, the evidence shows that on the said 5th day of April, 1894, and continuously therefrom down to the 22nd day of October, 1894, the home of this plaintiff was at the Hawaiian islands.

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VI.

The evidence is insufficient to justify that portion of the finding designated 12, of the decision hereinbefore contained, to the effect that the plaintiff, through her attorney, notified adverse counsel in

the said action, in accordance with the rules of the said court, of the filing of the said bill of exceptions.

On the contrary, there is no evidence to show that said adverse counsel were notified of the filing of said bill of exceptions.

The said decision is against law in this:—

I.

That the findings of fact therein set forth do not determine all of the issues raised by the pleadings herein, in this:—

(*a.*) The court has not found, upon the allegations contained in the amended answer herein, to the effect that the decree of divorce rendered in the said divorce action of McGrew *v.* McGrew has never been modified or set aside, and is, and was, at the time of the commencement of this action, in full force and effect.

(*b.*) The said findings of fact do not determine the issues raised by the following allegation in said answer:—

"That under and by virtue of the foregoing provision of law and decree of divorce, all rights of the said Alphonsine McGrew
74 in, and to said policy of insurance did pass to the said Henri Golden McGrew, and became his absolute property, free and clear of any claim of the said Alphonsine McGrew, plaintiff herein, whatsoever."

(*c.*) Said findings of fact have not determined the issue raised in said amended answer, to the effect that the said insurance company has been compelled to pay to J. O. Carter, as the administrator of the estate of said Henri Golden McGrew, deceased, the full amount of said policy, and that, by said payment, said defendant discharged all its obligations in said policy to any one whomsoever.

II.

The first conclusion of law in said decision contained is not supported by the findings of fact therein contained.

III.

The second conclusion of law therein contained is not supported by the findings of fact therein contained.

Errors of Law Occurring at the Trial and Excepted to by the said Defendants.

I.

The court erred in sustaining the objection of the plaintiff to the introduction in evidence of the payment by the said insurance company to J. O. Carter, as the administrator of the estate of said
75 Henri Golden McGrew, deceased, of the full amount of money due upon said policy (exception No. 1).

II.

The court erred in overruling the objection of the defendant to the introduction of the rules of practice adopted by the circuit court

of Hawaii, relative to the filing of the bills of exception with the clerk. (Exception No. 4.)

III.

The court erred in overruling the objection to the introduction of that portion of the compiled laws of Hawaii relating to the certification of bills of exception. (Exception No. 5.)

IV.

The court erred in overruling the objection of the defendant to the evidence of the plaintiff as to her intention in leaving the Hawaiian islands. (Exceptions Nos. 6, 7, 8, and 9.)

V.

The court erred in sustaining the objection of the plaintiff to the question asked by the defendant of the plaintiff to the effect that the said Henri G. McGrew was a kind and indulgent husband to said plaintiff, and had always provided her with a home in Honolulu. (Exception No. 10.)

VI.

76 The court erred in sustaining the objection of the plaintiff to the following question asked by the defendant: "Did your husband ask you not to leave him?" (Exception No. 11.)

VII.

The court erred in sustaining the objection to the question: "Had there been any estrangement between the doctor's family and yourself before you left Honolulu on April 5, 1894?" (Exception No. 12.)

VIII.

The court erred in sustaining the objection of the plaintiff to the question: "What made you think that you could get a home here in San Francisco." (Exception No. 13.)

IX.

The court erred in refusing to strike out the answer of the plaintiff, as follows:

"Mr. Carter came out in the paper that nothing was to be delivered to me." (Exception No. 14.)

X.

The court erred in overruling the objection of the defendant to the introduction of the bill of exceptions in the said divorce proceedings. (Exception No. 2.)

XI.

77 The court erred in overruling the objection to the introduction in evidence of the motion of A. S. Humphreys and the affidavit of Clarence W. Ashford. (Exception No. 3.)

XII.

The court erred in making and filing its decision in favor of plaintiff and against defendant herein.

And now, in order that the same may be made a matter of record, the defendant proposes the foregoing as its bill of exceptions and prays for its settlement and allowance as so presented as aforesaid.

Dated October 30, 1897.

CHICKERING, THOMAS & GREGORY,
Attorneys for Defendant.

I agree to the foregoing bill of exceptions.

PLATT & BAYNE,
Attorneys for Plaintiff.

I hereby certify that the foregoing bill of exceptions has been presented to me, the judge who tried said case, in due time, and the same is hereby settled and allowed as a bill of exceptions in said case, and certified to be correct.

GEORGE H. BAHRS, *Judge.*

Dated Nov. 1, 1897.

(Endorsed:) Filed Nov. 1, 1897. C. F. Curry, clerk. By T. C. Maher, deputy clerk.

78 (Title of Court and Cause.)

Notice of Appeal.

To the plaintiff and Messrs Platt & Bayne, her attorneys:

You, and each of you, will please take notice that the defendant in the above-entitled action, hereby appeals to the supreme court of the State of California, from the judgment therein made and entered in said superior court on the 11th day of October, 1897, in favor of plaintiff in said action, and against the said defendant, and from the whole thereof.

CHICKERING, THOMAS & GREGORY,
Attorneys for said Defendant.

Dated Nov. 2, 1897.

(Endorsed:) Due service by copy of the within notice of appeal is hereby admitted this 2nd day of November, 1897. Platt & Bayne, attorneys for plaintiff. Filed November 3, 1897. C. F. Curry, clerk. By T. C. Maher, deputy clerk.

79 (Title of Court and Cause.)

Stipulation.

It is hereby stipulated that the foregoing is a full, true, and correct transcript on appeal from the judgment in the above-entitled action.

And it is further stipulated that a written stipulation has been filed in the above-entitled cause, waiving an undertaking to stay

execution on the judgment herein, and that a good and sufficient undertaking on appeal for costs, in due form of law was, on the 3rd day of November, 1897, filed in said action.

Dated this 9th day of November, A. D. 1897.

W. E. B.

CHICKERING, THOMAS & GREGORY,
Attorneys for Appellant.

PLATT & BAYNE, *Attorneys for Respondent.*

(Title of Court and Cause.)

Clerk's Certificate of Transcript.

I, C. F. Curry, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court in and for the city and county of San Francisco, do hereby certify that I have compared the foregoing transcript on appeal with the original papers in the above-entitled action now on file in my office, and with the orders therein made and entered in the min-
80 utes of said court, and that the said transcript is a full, true, and correct copy thereof.

I certify that a stipulation waiving an undertaking to stay execution has been duly filed, and do further certify, that a good and sufficient undertaking on appeal for costs, in due form of law, was, on the 3rd day of November, A. D. 1897, duly and properly filed in said action.

In witness whereof, I have hereunto set my hand and affixed the seal of the said superior court this — day of November, A. D. 1897.

[SEAL.]

—— ——, *Clerk*,
By —— ——,
Deputy Clerk.

80½ Received a copy of the within transcript this 9th day of November, A. D. 1897. PLATT & BAYNE,
Attorneys for Respondent.

W. E. B.

81 San Francisco, No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Brief.

Chickering, Thomas & Gregory, attorneys for appellant.

Filed this Feb. 2, 1898 *day of February, A. D. 1898.*

T. H. WARD, *Clerk*,
By A. W. JOHNSON,
Deputy Clerk.

W. E. B.

81½ In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Brief.

Henri G. McGrew, a member of a prominent Hawaiian family, had lived practically all his life in the Hawaiian islands. In 1890, while a student of medicine in Paris, he met and married the plaintiff, and soon thereafter returned with her to Honolulu, where he engaged in the practice of his profession.

In 1892 he filed an application with the defendant's local agent at Honolulu for a policy of insurance upon his life, and in
82 response the policy in suit was issued to him. By its terms it was made payable to "Alphonsine McGrew, my wife."

In the early part of the year 1894, Henri McGrew, whose mind had been failing for some time previous thereto, was judicially declared incompetent by a court of the Hawaiian islands having jurisdiction of such matters, and Charles L. Carter was appointed the guardian of his person and estate.

Upon February 8, 1894, an action was begun by Mr. Carter, as the guardian of Henri McGrew, against the plaintiff herein, for a divorce upon the ground of her adultery, and process was, on the same day, served upon her at Honolulu. She thereupon appeared in the action and filed an application, verified by herself, for attorneys' fees and alimony *pendente lite*, therein stating that she was desirous of contesting the suit, and required assistance to do so.

Upon April 11th she demurred to the libel, upon the ground that the guardian of an insane person had no authority to maintain a suit for divorce in behalf of his ward. The trial court reserved this question for the consideration of the supreme court, and accordingly an opinion was therein rendered July 31st, holding that the demurrer was not well taken. (McGrew *v.* McGrew, 9 Hawaiian Reports, 475.) (These opinions have been made a part of the record, fol. 119.)

Thereupon an answer was filed by Mrs. McGrew, denying all the allegations of the complaint, and upon the issues thus joined,
83 a trial was had. At this trial evidence was introduced by both parties, and, after argument by counsel, a decision was rendered on August 23, 1894, granting the prayer of the libel, which judgment was entered on the next day. From this judgment no appeal was taken, but a draft of a bill of exceptions was prepared and delivered by the attorney of Mrs. McGrew to the clerk of the court for the certificate of the trial judge, who was temporarily without the islands. It was not, however, certified by the judge on his return, and has never been certified, as required by the practice of that court.

Upon the 22d of October, 1894, Henri McGrew died at Honolulu,

and Charles L. Carter was appointed administrator of his estate. Shortly thereafter, as such administrator, he commenced an action against the defendant company to recover the proceeds of the policy of life insurance. This action was founded upon the fact that there was, upon the books of Hawaii, a law providing that, whenever a divorce was decreed for the adultery of the wife, the husband should hold her personal estate forever. It was claimed that, by virtue of this statute, the beneficial interest of Mrs. McGrew in the policy had passed to Henri McGrew upon the rendition of the divorce decree, and that, upon the latter's death, it descended to his personal representative.

The company answered, contesting this assignment, but after trial had, a judgment was given the plaintiff for the full amount of the policy. From this judgment an appeal was prosecuted to
84 the supreme court, and after elaborate arguments, a decision was there rendered affirming the judgment.

Carter *v.* Mutual Life, 10 Hawaiian R. 117.

By this decision the following facts were determined:

1. That Alphonsine McGrew was not a necessary party to the action of Carter *v.* Insurance Company.

2. That Henri McGrew and Alphonsine McGrew were divorced by the decree of August 24, 1894, and that decree had become final, notwithstanding the alleged bill of exceptions.

3. That the provisions of the statute above mentioned were applicable to the interest of Alphonsine McGrew in the life insurance policy, and that, therefore, this interest passed to the administrator of the estate of Henri.

Thereupon the company filed a petition for rehearing, upon which exhaustive oral argument was again had, and a second opinion rendered (10 H. R. 559), reaffirming the principles of the first opinion and, deciding, in addition:

1. That the statute was constitutional.

2. That the property rights in the policy were a necessary incident to the divorce decree, and passed by operation of law.

3. That the removal of Alphonsine from Hawaii, before the rendition of the decree, did not take away its operative effect upon her personal estate.

85 The rehearing being thus denied, the company was compelled to pay the amount of the policy, with interest and costs, to the administrator, and received from him the policy cancelled, and receipt in full.

On April 5, 1894, a little less than two months after the commencement of the divorce action, Alphonsine McGrew left Honolulu and came to San Francisco, where she has since resided. It is found by the trial court that she came here without the intention of returning to Honolulu, and that she has, ever since her arrival here, been domiciled in the State of California.

It will thus be seen that the only question now involved in the present action is the validity of the previous transfer by operation of the Hawaiian law. If this court takes the same view of this

transfer as did the Hawaiian court, the judgment must be reversed; if not, the company must pay the same policy twice.

First point.

The divorce decree in McGrew *v.* McGrew is conclusive upon this court, because a divorce, good where obtained, is good everywhere.

(1.) It is a fundamental proposition that all divorce jurisdiction depends upon the domicile of the parties. When a tribunal of that domicile has required jurisdiction of the parties, and has thereafter granted a divorce, it is valid everywhere. This is grounded
86 upon the eminently just proposition that each country has the right to regulate the status of the persons who have made it their home. If matrimonial differences arise, they must be referred to such a tribunal. So far, at least, as it affects the status of the parties, such a proceeding is *in rem*, and binding upon all the world.

In re Newman, 75 Cal. 213;
In re James, 99 Cal. 374;
Burlen *v.* Shannon, 3 Gray, 387;
Cheely *v.* Clayton, 110 U. S. 701.
Black on Judgments, sec. 822.

Being a proceeding *in rem*, a foreign decree of divorce is as controlling upon our courts as a domestic decree.

Sec. 1915, sub. 1, C. C. P.;
Hilton *v.* Guyot, 159 U. S., p. 167.

The facts heretofore stated, and the findings of the trial court, show that both parties to the action of McGrew *v.* McGrew were domiciled in Hawaii at the time of the commencement of that action. That the defendant was not only served with process there, but also appeared and contested every phase of the litigation, thus submitting herself fully to the jurisdiction of the courts of that country. It is, therefore, immaterial whether the Hawaiian court violated a "uniform current of authority," as is claimed by the respondent, in allowing a guardian of an insane person to bring an action for a divorce, because this question having been
87 directly brought in issue in the Hawaiian suit, and decided adversely to the contention of respondent, she is now concluded by it.

It is not true, however, were we to consider this question in the first instance, that the decision in McGrew *v.* McGrew is opposed by authority. That decision is expressly based upon the construction of an Hawaiian statute. The court, after a full examination of the adjudicated cases, said (9 H. R. 478):

"On authority we should be obliged to hold that, in the absence of statute, this suit could not be maintained, and the sole question is whether our statutes go to the extent of allowing such a suit."

This question they answer in the affirmative.

That such a right of action can be established by statute has never been questioned, and, under these statutes, actions for divorce

by guardian, have been frequently maintained in England and the United States.

2 Bishop M. & D. 306;
Thayer *v. Id.*, 9 R. I. 377;
Garnett *v. Id.*, 114 Mass. 379;
Cowan *v. Id.*, 139 Mass. 377;
Baker *v. Id.*, L. R. 9 P. D. 142.

The statute upon which this decision was based has not been introduced in evidence, and since it must be assumed that the Hawaiian court correctly construed its local statute, and that
88 this statute authorizes such a proceeding, this decision is clearly not opposed to, but in harmony with, the authorities of this country and England.

(2.) The decree of divorce became final prior to the commencement of this action.

One of the allegations in the answer (fol. 38) is "that, on the 23d day of August, 1894, a decision was rendered by the circuit court, dissolving the bonds of matrimony theretofore existing between said parties, upon the ground of the adultery of the said Alphonsine McGrew, which said decree of divorce has never been modified or set aside, and ever since has been, and now is, in full force and effect."

The trial court has made no finding upon the finality of this decree, simply stating (fol. 53) that a divorce decree was signed. This has been especially assigned as error (fol. 219), upon the ground that the court has not found upon all the issues of fact presented by the pleadings. If this be, however, a conclusion of law, as claimed by the respondent, which may now be determined by this court, irrespective of any finding by the trial court, then we submit these considerations.

It is claimed by respondent that the divorce decree did not become final, because the alleged bill of exceptions was not disposed of before the death of Henri; that after his death, no further steps could be taken, even in reference to property rights, and therefore Alphonsine was the wife of Henri at the time of his death.
89 This contention is based upon an Hawaiian statute (fol. 160), reading as follows:

"Any party aggrieved by any order or decision of the circuit court may except thereto, and his exceptions shall be duly noted and certified to the supreme court, and no order or decree for a divorce shall be made absolute until such exceptions shall be disposed of. Said exceptions shall be argued and determined in the supreme court sitting *in banco*, and if the court *in banco* shall be of opinion that the order or decision excepted to in said circuit court was erroneous, they shall so certify, and thereupon the case shall be heard anew."

The admissibility in evidence of this statute will be considered further. The question here presented relates to a matter of local procedure and practice. It is simply whether a proposed bill of exceptions must be certified, under the Hawaiian law, before it can

be operative in preventing a decree of divorce from becoming absolute.

In the case of Carter *v.* Mutual Life, 10 H. R. 117, this question was considered at length by the Hawaiian court, and the following conclusion reached:

"The practice here in divorce, as in other law cases, has usually been to enter at once, in the circuit court, an absolute decree or judgment, which is subject to be set aside by the supreme court on exceptions. This is what is meant by the provisions of the statute that 'no order or decree for a divorce shall be made absolute
90 until such exceptions shall have been disposed of.' An absolute decree is made at once, but, if excepted to, it may be set aside by the supreme court. If not excepted to it is, and remains, absolute. This has been the construction placed upon the statute in practice, and it is in harmony with the more general provisions and the practice thereunder relating to exceptions in all law cases. (Laws of 1892, chap. 57, secs. 72–78.) The 'exceptions' referred to in the statute are 'exceptions allowed or certified by the supreme court.' If they are merely exceptions alleged to have been made by counsel, whether allowed or certified or not by the court, and if no absolute decree could be made until such exceptions are argued and determined in the supreme court, it would be in the power of the party, against whom the decree of divorce has been made, to forever prevent the decree from becoming absolute by merely filing alleged exceptions, perhaps wholly 'uncomfortable to truth,' and never following them up, or attempting to have them allowed or certified, but, on the contrary, resisting all endeavors on the part of the opposite party to have them disposed of. In this case it appears that no exceptions have ever been allowed or certified to the supreme court, and from all the circumstances, it would seem that the libellee had abandoned her intention, if she had any, of getting her exceptions allowed, if she could, and having them argued and determined in the supreme court."

The decision of the Hawaiian court upon this question of practice is conclusive upon this court.

In Elmendorf *v.* Taylor, 10 Wheaton, 152, Chief Justice Marshall said:—

"No court in the universe which professes to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misun-
91 derstood their own statutes, and, therefore, erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

For this court to hold that the Hawaiian court had made a mistake in construing its own rule of practice would lead to an absurdity, for questions of practice and procedure are, in a large measure, derived from the decisions of the courts themselves, and from the rules which the courts adopt for their own administration.

To say that the Hawaiian court made a mistake in this construction, would necessitate the production before this court of all the facts and circumstances surrounding the case at Honolulu. At the very outset it appears that their construction is based upon analogy with the practice relating to exceptions in law cases, and those other statutes are specifically referred to. These statutes have not been introduced in evidence, and this court cannot now say what they contain, much less what the "uniform practice" in this regard has been there.

There is another ground upon which Alphonsine McGrew cannot now be heard to say that this decree did not become final. Her actions since that time show that she has abandoned any right of having her case passed upon by the appellate tribunal. They
92 show that she cannot make this contention in good faith. A brief reference to dates will show this.

The alleged bill of exceptions was filed with the clerk of the court October 1, 1894, but no effort has ever been made by the defendant to have them certified, or to compel the clerk so to do. If there is no fixed time within which a bill of exceptions must be presented to the appellate tribunal, it must be within a reasonable time. This right, like every other legal right, may be lost by laches, and a delay of nearly three years in presenting the bill of exceptions for certification, without explanation, warrants this court in assuming that the appeal was long since abandoned.

In contrast to this reluctance of the defendant in the divorce suit to have the supreme court decide the matter, is the activity of the plaintiff, or libellant. On October 2, 1894, the latter appeared before the supreme court and prayed that the bill be heard without a settlement. At the hearing of this motion Mr. Ashford, counsel for Mrs McGrew, appeared and opposed it. The court declined to act because the bill had not been signed by the trial judge. Nevertheless, although the mode of procedure was then pointed out by the supreme court, and notwithstanding the subsequent decision of Carter *v.* Mutual Life, on August 15, 1895, that the divorce decree was final, and that the same could have been passed upon by the appellate court, notwithstanding the death of Henri, neither Alphonsine nor her counsel made any effort whatever to press the matter
93 until January 19, 1897, when precisely the same motion that had been theretofore denied was again made, to wit: a motion before the supreme court to pass upon the matter without the allowance of the bill. Why, during all this period, was not this bill presented to the trial judge for his allowance or rejection? Why, after full knowledge of the rulings of the court, did not counsel adopt the procedure pointed out by that court? The only answer suggested by counsel to those inquiries is that, by the death of Henri McGrew, the action for all its purposes abated. But the Hawaiian court had decided precisely the reverse; this was the law of the case, and no litigant can excuse himself for his neglect to avail himself of a certain course of procedure by simply stating that the procedure is wrong.

But were we to pass for a moment the proposition that, by its de-

cision in Carter *v.* Mutual Life, the Hawaiian court laid down a course of procedure which was conclusive upon all parties who thereafter came before the tribunals of that country, and examine anew the merits of that decision, it would be clear that it is correct. It is, of course, the rule that death abates the action of divorce so far as it applies to the status of the parties, but it is not true so far as the property rights are concerned, which was the precise distinction made by the Hawaiian court. In Thomas *v.* Thomas, 57 Md. 554, it is said :

"So far as the question of the marital relation was con-
94 cerned, that question was forever concluded by the death of the appellee, and no one had any longer any interest in reviving it; but the decree which granted the divorce at the same time determined the property rights of the appellant, and, if unreversed, deprived her of all rights in her late husband's property. With respect to that question, her interest survived, and, if the decree was erroneous she was aggrieved thereby, and had a standing in court to prosecute an appeal therefrom for the purpose of having the decree reversed."

And that a right of appeal may exist in a divorce case, so far as property rights are concerned, notwithstanding the death of one of the parties, is directly decided by the following authorities:

Wren *v.* Moss, 7 Ill. (2 Gill), 72;
Downer *v.* Howard, 44 Wis. 82;
Shafer *v.* *Id.*, 30 Mich. 162;

Nor can plaintiff excuse her negligence by the fact that the proposed bill of exceptions was delivered to the clerk. All the circumstances surrounding the case and the argument of counsel herein, show that the clerk did not present the bill, because Mrs. McGrew's attorney asked him not to do so, thinking that the death of Henri rendered further proceedings useless. This is clearly shown by Mr. Ashford's affidavit (fol. 153), wherein he states that he took no further step in the matter, believing that the suit was terminated by the death. In this belief he was mistaken, and the consequence of his mistake must fall upon his client, and not upon the other party to the suit.
95 That no reliance was placed upon the filing with the clerk is further shown by the subsequent motion made in the supreme court (fol. 144); there the attorney for Alphonsine prayed the appellate court to settle the bill. He had taken it from the clerk, but still presented it to the wrong tribunal. That he did not present it to the trial judge, even at that late date, shows that the defendant in that case did not desire a hearing in the supreme court. Upon this branch of the case we submit:—

(1.) The divorce decree is conclusive upon this court, because a divorce good where obtained is good everywhere.

(2.) The divorce decree was final when entered, because the Hawaiian court have so decided.

(3.) The divorce decree became final before this action was begun, by reason of the laches of Alphonsine McGrew.

Second point.

The Hawaiian statute is mandatory and self-executing, and upon the rendition of the divorce decree, the interest of Alphonsine McGrew in the insurance policy passed by operation of law.

It will be observed that this statute (fol. 117) does not contemplate nor require that the personal estate of the wife shall be named in the decree; on the contrary, it provides that, in all cases, the personal estate of the wife passes to the husband when a
96 divorce is decreed on account of her adultery. In this respect little aid may be obtained from the decisions of California, because our statutes (secs. 146–147 of the Civil Code) provide that the "court shall assign property, etc.," thus clearly showing that title passes only when the court has made a finding to that effect. In other words, our statutes are not self-executing; but it is equally plain that the Hawaiian statute did not contemplate the necessity of an intervening decree of court which should directly pass upon property rights. That court could have no power to grant a divorce upon this special ground, and say that the wife's personal property should not pass from her, any more than our court could declare a person insolvent, and say that the title of his property did not pass from him. Since any action the court might take in reference to the personal estate of the wife would be nugatory, it was neither necessary nor proper that any mention of those rights appear in the pleadings or the decree.

In other States, statutes similar to this have been construed. A precise analogy may be found in section 495 of the Code of Oregon, which, prior to 1865, declared:—

"Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made, shall, in all cases, be entitled to the one-third interest in his or her individual right in fee of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in sec. 497."

97 In 1865 the following sentence was added to the section:

"And it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

In construing this statute Judge Deady, in Barrett *v.* Failing, 6 Saw. 473, (affirmed 111 U. S. 523), said:

"As it originally stood in the code, this section simply provided that, upon the dissolution of a marriage, the real property of the parties should be discharged from any claim or interest of the other therein; providing, if the marriage was dissolved on account of the adultery or conviction of a felony of either party, then the innocent party should be entitled, as tenant in dower, or by the courtesy, as the case might be, in the real property of the other, the same as if that other were dead. *The statute declared this to be the legal effect and operation of the decree, and it was neither necessary nor proper that the pleadings or decree should allege or contain anything on the subject.*"

In Bamford *v. Id.* 4 Or. 30, the supreme court, in construing the

same statute, held that by the amendment it was evidently the intention of the legislature that the court should include in its decree a reference to property rights, saying;

"If it was the design that granting a decree of divorce should, in every case, have the effect to transfer one-third of the real estate of the party at fault, without specifying particular parcels, there would be no necessity for requiring the court to enter anything in the decree on that subjec. *The desired result would be produced by the law, and not by the formal words entered in the decree.* If that is the construction, the last provision may be stricken out without altering the effect of the statute." The italics are ours.

98 The rights of husband and wife in the property of each other upon divorce, depend entirely upon statute. Indeed, all divorce jurisdiction depends upon statute.

Works on Jurisdiction, sec. 73;
Hopkins *v. Id.*, 39 Wis. 167;
Le Baron *v. Id.*, 35 Vt. 364.

If a statute provides that the innocent party is entitled to certain property rights by operation of law, a decree of such court is as binding upon those property rights as it is upon the status of the parties. The proceeding, then, is for something more than a dissolution of the marriage tie, and is akin (in relation to property rights) to marriage at the common law, where, without any agreement to that effect, but, by operation of law, property rights pass from the wife to the husband.

In many States it is provided that, upon a divorce for the adultery of the wife, the husband holds her personal estate absolutely. Such is the law in Maine, Vermont, Rhode Island, Michigan, Nebraska, and Arizona.

Stimpson Amer. Stat. Law, sec. 6249.

In many other States it is provided that a wife, divorced on account of the adultery of her husband, is entitled to her dower right the same as if he were dead.

Bishop on M. & D., sec. 709;
Davol *v.* Howland, 14 Mass. 219;
Harding *v.* Alden, 9 Me. 140;
4 Kent Com. 54.

99 The one-third interest passes to the wife upon the rendition of the divorce. It has been held that the court has no power to assign it in the decree, but the wife must procure her rights by an independent action.

Smith *v.* Smith, 13 Mass. 231.

Mr. Bishop, in his recent work on Marriage, Divorce, and Separation, speaking on this question says, section 1521:

"Both in natural propriety and juridical reason, the sentence should be an embodiment in direct words of the determination of he court upon the combined pleadings and the admitted proven acts when all have been duly produced by the parties, passed upon

by the jury, if necessary, and considered by the judge. What will flow from the sentence as of law ought not to be inserted in it, for the court has no control over such a matter, and an attempted determination thereof would be simply an extrajurisdictional impertinence."

And, again, section 1522, he says:

"Some of our statutes give the wife dower on a dissolution of the marriage for the husband's fault, not on the fault itself, but on the divorce. Plainly, therefore, it would be vain and extrajurisdictional for the decree to declare her right to dower, and contrary to law to deny it."

The foregoing are cited merely as instances of legislation by which property rights pass to the innocent party in a divorce suit, although no mention of these rights has been made either in the pleadings or decree. They show that a decree of divorce may not only fix the status of the parties, but also may, by virtue of
100 that status, cause certain property rights to be divested.

There is nothing anomalous in such a judgment, as the following familiar examples will show: An adjudication of insolvency passes property from the insolvent by operation of law, without any order to that effect. Rued *v.* Cooper, 109 Cal. 683. Marriage, an adjudication of heirship, a conviction for certain criminal offenses, are all cases where there may be an alienation of title to property, resulting as a necessary incident from the adjudication of a personal status.

We claim that the Hawaiian statute is in line with these examples; that the proceedings were not only for the purpose of obtaining a divorce and thus determining the status of the parties, but also, and as a necessary incident, to fix the personal property rights of Alphonsine McGrew. That it is precisely analogous to the effect of a divorce decree upon a dower right. Such being the nature of the proceedings, the respondent here is bound by that judgment, for the force of a judgment extends to everything which must necessarily be determined by it.

As stated by Story on Conflict of Law, sec. 230*b*:

"Incidents of a foreign divorce are also fairly to be deduced from the law of the place where it is decreed. If valid there, the divorce will have, and it ought in general to have, all the effect in every other country upon personal property locally situated there, which are properly attributable to it in the forum where it is decreed."
101 This was the view adopted by the Hawaiian court in their opinion rendered upon the petition for rehearing in Carter *v.* Mutual Life, where they said:

"The court having acquired jurisdiction under these circumstances, the incident of the divorce would follow according to the law of the place of the divorce."

Since the present action is not between the same parties as the divorce action, the judgment in the latter case cannot be technically pleaded as *res judicata* so far as property rights are concerned; but it is manifest that the result must be the same; that is, if in any subsequent suit between Mr. and Mrs. McGrew this judgment would

have been a bar as to all matters within its scope, then it must have operated as a valid transfer of which this defendant, although a stranger to the former record, may avail itself.

Assume, therefore, that Henri McGrew were still living: that Alphonsine had removed to California, bringing with her the policy, and that Henri had brought action in replevin in the courts of this State to recover the policy. Henri could then produce a judgment between the same parties, rendered in a court of competent jurisdiction, wherein the property rights in the policy had necessarily been adjudicated. The California court would then have before it simply the question of the effect to be given to the foreign decree. So
for as it affected the status of the parties, it is a decree *in rem*
102 and conclusive; so far as it affected property rights, it would
be a decree *in personam*, and by the comity of nations, binding upon both parties to the action in this forum.

That such result must have followed in a subsequent suit between the two parties is a necessary consequence of the recent decision of the U. S. Supreme Court in Hilton *v.* Guyot, where the subject of the binding effect of a decree of a foreign court is exhaustively discussed. They say, 159 U. S. 202:

"In view of all the authorities upon the subject and of the trend of judicial opinion in this country and England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not in an action brought in this country upon the judgment, be tried afresh as on a new trial, or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity, or the effect of the judgment sued on."

The system of jurisprudence in Hawaii is founded upon the common law of England, which is also the groundwork of the
103 laws of California (Pol. Code, 4468). It would appear that
Alphonsine McGrew was given a fair and full trial abroad, before a court of competent jurisdiction, and, therefore, in such a suit she could not be heard in her assertion that the foreign judgment was erroneous in law or in fact.

The principle thus laid down in Hilton *v.* Guyot, is especially applicable to an Hawaiian judgment, on account of the treaty obligations between the United States and that country. By article VIII of the treaty, proclaimed November 9, 1850 (Treaties and Conventions of the United States, page 540), of which this court will take judicial cognizance (sec. 1875, C. C. P.), it was provided that the rights

to the personal property of a citizen of either country should be "decided finally by the laws and judges in the land wherein the said goods are."

At the time the divorce litigation was commenced, Mrs. McGrew was an Hawaiian subject. Under no possibility could she have been a subject of the United States, because her former home had been in Paris, France; but, even assuming that by her change of residence to California she became a subject of the United States, and was such at the time of the rendition of the decree, still the judgment of the court below violates this treaty obligation, in that it has not left the decision, as to the ownership of this insurance policy, to the laws and judges of Hawaii. Whatever rights were acquired in the policy were acquired in Hawaii. The application for the
104 policy was made there, and there it was delivered (folios 47–49). The policy always remained there, until delivered to the defendant. So far, then, as any chose in action may be said to have a locus, this had one in Hawaii.

Third point.

The change of residence of Alphonsine McGrew did not deprive the Hawaiian court of its jurisdiction, or divest the Hawaiian law of its operative effect upon the title to her property.

The judgment of the trial court was based solely upon the ground that Alphonsine McGrew had become domiciled in California before the rendition of the divorce decree; that the Hawaiian law had no extraterritorial effect, and, therefore, did not divest her of her property rights, because she had removed them from without its operation. It is respectfully submitted that this view does not take cognizance of the principal fact in the case, viz. that Mrs. McGrew had, before her departure, appeared in the divorce proceedings, and the Hawaiian court had obtained jurisdiction over her.

The citations, heretofore given, show that it was neither proper nor necessary to make any mention of property rights in the pleadings. Mrs. McGrew is presumed to know the law, and with this knowledge, must have known that the effect of a decree in
105 the divorce proceeding would be to divest her of her personal estate. Let it be particularly noted that the rights of no third party are concerned here. She did not sell or assign her interest to an innocent purchaser, who had no knowledge of the divorce proceedings; on the contrary, it is she who now claims the ownership of this policy, notwithstanding the fact that she withdrew from the Hawaiian islands knowing that her personal estate was in process of litigation. She was the owner both at the commencement of the action and when the decree was rendered.

The jurisdiction having once attached, it could not be ousted by a change of residence of one of the parties. Thus in 12 Ency. of Law, 305, it is said (in the foot-note):—

"The jurisdiction of a court depends upon the state of things at the time the action is brought. Once vested, it is not ousted by

subsequent events. Thus no change in the residence of parties can take away jurisdiction that has once attached."

The Hawaiian court, in its opinion on petition for rehearing, said:—

"Both parties were undoubtedly domiciled here when the divorce proceedings were commenced and when the court acquired jurisdiction over them, and that was sufficient so far as the question of domicile was concerned."

To the same effect is:—

Tapley *v.* Martin, 116 Mass. 275;
Lowry *v.* Hall, 37 Amer. Dec. 495;
Harrison *v.* Id., 20 Ala. 269.

106 We claim, therefore, that the removal of Alphonsine McGrew to California is a false quantity in this case. It could have no possible effect upon the results of the litigation already commenced. If her personal estate was not involved in that litigation, then, if she had remained in Hawaii, that estate would not have been affected by the decree; but, on the contrary, if her personal estate was involved in that litigation, the fact that she withdrew unto another jurisdiction could not oust it. That jurisdiction having attached, she could not take an unqualified interest in her personal estate to any place however remote; it would always be subject to divestment under the proceedings already begun.

This may be made apparent by simple analogy. Assume that creditors file a petition in a superior court of this State praying that their debtor be declared insolvent. The order to show cause is served upon him here. Before the adjudication of insolvency, he removes to Nevada, taking with him a piano. Assume that by the law of California this property is not exempt from execution, and therefore passes to the assignee, but that, by the law of Nevada, it is exempt. Could the insolvent claim that by this change of domicile the superior court was ousted of its jurisdiction to divest the insolvent of this property by the adjudication of insolvency? We think clearly not, for such a rule would permit any one to defeat the effects of a judicial proceeding by simply removing to another jurisdiction.

107 The case at bar presents many features which emphasize our position in this regard.

The respondent remained in Honolulu nearly two months after process was served upon her. She appeared by an attorney, made application for counsel fees, and stated that she desired to contest the suit. Her attorney remained in Honolulu representing her throughout the many stages of a protracted litigation. Had she been successful, the judgment would have been *res judicata* upon the merits of the case, including the title to this insurance policy, (Bishop M. D. & S. 1595.) Henri McGrew could never thereafter have brought a subsequent suit for the same acts of infidelity alleged in that suit and secured a divorce or the title to her property; thus the judgment would have benefited her. She should not be allowed to pursue litigation there to the end, and, after defeat, claim that she had

not submitted all questions involved, to the jurisdiction of that court and the operation of its laws.

Fourth point.

When the Hawaiian decree of divorce became final, property rights in the personal estate of Alphonsine McGrew vested in Henri McGrew. Having thus vested, they were valid the world over.

The trial court has admitted in evidence the Hawaiian statute, against the objections of the respondent. It will, however,
108 doubtless be urged by the learned counsel that this is a penal statute, and therefore it can have no extraterritorial effect. This point is intimately connected with our last point. If we are correct in asserting that the removal of Alphonsine could have no possible effect upon pending litigation, then we may consider that she was—constructively at least—in Hawaiian islands during the progress of that suit. If the Hawaiian statute ever went into effect, it did so there. It became executed there. It can in no sense be executory now. Since the statute and the judgment are inseparable, and the effect of the one follows necessarily from the other, Henri McGrew became vested, if at all, with the personal estate of his former wife in Honolulu.

A legal title duly acquired in any one country, is a good title all over the world.

Sutherland Stat. Con. sec. 13.

And when parties have acquired property right in one jurisdiction and thereafter move into another, their rights must be determined by the laws of the former. The proposition, therefore, that the courts of one country will refuse to execute the penal laws of another country, can have no possible bearing upon this case, because, if the divorce decree had any effect whatever upon this insurance policy, it had that effect in Hawaii.

The difference between the admissibility of a foreign statute for the purpose of enforcing it, and for the purpose of showing property rights already vested in that foreign country, is clear
109 and fundamental. An excellent example is given in the case of Beard's Ex. *v.* Basye, 7 B. Monroe (Ky.) 133.

This was an action in detinue for certain slaves, which had been the property of Mary McDonald while she was a resident of Louisiana and before her marriage. In 1825 she married McDonald, who then persuaded her to remove to Kentucky. By the laws of Louisiana these slaves were the separate property of Mrs. McDonald, but, by the laws of Kentucky, they became her husband's immediately upon marriage. The husband sold the slaves, and then the wife brought this action in a Kentucky court to recover them. The court said (page 141):—

"We are brought to the very important question, whether by the removal of McDonald and wife to Kentucky the right of the latter to the slaves which, notwithstanding her marriage, continued, by the laws of Louisiana, to be her property, became under the laws of

Kentucky absolutely lost to her and absolutely invested in her husband. * * *" And at page 144, "By what law then is she to be divested of this vested right and ownership and the slaves which were hers vested absolutely in her husband? Surely it will not do to say that, because women married and residing here do not, and cannot, hold personal property, therefore a woman married elsewhere and allowed by the laws there to hold her property shall upon coming here with her husband be deprived all interest to it. The laws of Louisiana cannot, it is true, be brought here to create a right nor regulate the mode of its exercise or assertion, and certainly not to establish a right in contravention of our laws or policy and to the injury of our citizens. But they may be brought here to
110 establish or prove a right existing there while the parties and the subject were wholly within the jurisdiction of that State."

In Forbes *v.* Scannell, 13 Cal. 242, a like question in principle was discussed. There an assignment had been made in China of certain property then on the high seas. The assignment was void by California law, and opposed to the policy of this State. The court admits this, but says:—

"There would be more force in this view if this were an executory agreement to make an assignment in this State of this character, or if this property were within this State at the time of the assignment. But here the contract, such as it was, was executed beyond the jurisdiction. The property was beyond this State, the parties also; the actual possession taken, and the title vested in the foreign jurisdiction. The property came into this State with the full effect, whatever that was, which the contract made abroad impressed upon it. * * * The truth is, we do not consider this question as one of comity at all. It is a pure question of property. By our general laws, we recognize the duty of government to protect property, and that is property which is acquired by contract, lawful and effectual, to pass title in the place where it is made. It might as well be said that, if a man made his money by usury in California and carried it into Pennsylvania, the courts of that State would refuse to recognize his right, because usury is against the policy of Pennsylvania. Or, if won at cards in Mexico, where no laws exist against gaming, it would cease to be his property whenever brought into this State."

Kraemer *v.* Id., 52 Cal. 303, holds that where husband and wife by their joint labor, acquire personal property in another State, and by the laws of that State it is the separate property of
111 the husband, and then bring it to California, it remains the property of the husband, although by the statutes of the latter State it would be common property.

We have other authority upon this subject. The learned counsel for plaintiff, while sitting in the quiet surroundings of his study, and not excited by the fumes of advocacy, has said: "If the husband or wife acquire property in one State and then remove to California or Texas with the same, the laws of the State where it was acquired (such being the State of their domicile) governs as to

the ownership of such property." Platt on Rights of Married Women, sec. 13.

Cooley on Con. Lim., page 440, says:—

"At the common law the husband immediately, on the marriage, succeeds to certain rights in the real and personal estate which the wife then possessed. These rights become vested at once, and any subsequent alterations of the law cannot take them away."

In Cahalan *v.* Monroe, 70 Ala. 271, it appeared that Michael and Catherine Cahalan were married in 1859, in South Carolina, that being their domicile. Catharine was then possessed of the sum of $8,500 in money acquired from a former husband. In 1870 they removed to Alabama, bringing the money with them, and invested it in Alabama property. The wife brought an action to enforce a
trust in the property so purchased, upon the ground that
112 her money bought it. By the law of Alabama this money and property were her separate estate, but, by the law of South Carolina, the husband was entitled to all the personal estate of the wife. It was claimed that the title to the money had vested in the husband by the law of South Carolina, where they were formerly domiciled; that this law controlled its title, and that a change of domicile thereafter did not change it. The court adopted this view, saying:—

"The domicile of both parties being then in South Carolina, the rights of the husband to property there acquired and owned by the wife, are to be ascertained and governed by such common-law principles. (Citing authorities.) By the common law, marriage operated as a gift to the husband of all personal property, including money owned by and in the possession of the wife at the time, and of all choses in action which might afterwards be reduced to possession by the husband during coverture. The husband was also entitled to the wife's earnings as they accrued. It follows that upon marriage the marital rights of the husband attached *eo instante*, and the personal property and money acquired by Mrs. Cahalan, before or during her coverture, and owned by her at or during this period, became absolutely his to the same extent as if he had purchased for value. There is nothing, we think, in the facts of this case which so modifies these principles as to bring it within the influence of Castlemon *v.* Jeffries, 60 Ala. 380. After the property became the husband's, the mere fact of bringing it into this State cannot we think, operate to change its status or ownership. Transportation alone cannot effect the question of title."

In Lichtenberger *v.* Graham, 15 Ind. 288, it appeared that the
plaintiff, while domiciled in Kentucky, acquired a certain
113 mule. By the law of Kentucky, the mule then became the property of the plaintiff's husband. Thereafter the parties became domiciled in Indiana, when the husband sold or traded the mule in exchange for a mare. Then the mare was traded in exchange for certain personal property, which the wife brought this action to recover. It was held that the property had vested by the law of Kentucky, and having once vested there, the removal to

Indiana did not change the right of property in it. The court saying:—

"By the law of Kentucky the mule became the property of the husband when received in part payment for the land sold by the wife. The fact that the husband and wife afterward removed to this State did not divest the ownership of the husband and make the mule the separate property of the wife under the statute of this State."

Passing events in the political world give an excellent example of the proposition that title having once vested cannot be divested by a change in the law. One of the plans suggested by which the annexation of Hawaii may be accomplished is that it become a county of California. Assume that Henri and Alphonsine McGrew still remained in Hawaii, and that annexation took place and Hawaii became a county of California. Immediately the laws of this State become operative there; but rights, which had vested by
114 virtue of the Hawaiian law, would not be divested because the law is changed, and if Henri McGrew had acquired a valid interest in this life-insurance policy the change in the law would not revest it in Alphonsine.

In the Estate of Appel, 66 Cal. 432, similar questions were discussed, the court holding that personal property should be distributed by the superior court of this State, in accordance with the laws of the State of Nevada.

In Harral *v.* Harrall, 39 N. J. Eq. 279, facts singularly similar to those in the case at bar were presented. Personal property in New Jersey was held by a New Jersey court to have previously passed to the plaintiff by a French law. By this French law a half interest in the property passed at once to the wife upon marriage. Evidence of this law was admitted, although directly opposed to the law of the forum. *Vide* also:—

3 Ency. of Law, 514 and cases cited;
Kurner *v.* O'Neill, 20 S. E. Rep. 589;
17 Cent. Law Journal, 377;
Bush *v.* Gayner, 73 Ala. 162;
N. W. Bank *v.* Poynter, 11 Rep. 129 (Eng.).

Upon this branch of the case we submit:—

(1.) The adjudication of property rights was a necessary incident to the divorce proceedings.

(2.) The statute being mandatory, title passed by operation of law, and no mention of property rights in the pleadings or decree was necessary or proper.

115 (3.) The change of residence of Alphonsine McGrew had no effect whatever upon the pending litigation.

(4.) The Hawaiian statute having been reduced to a judgment before the commencement of this action, became a rule of property conferring vested rights which must be respected here.

Fifth point.

The court erred in certain rulings.

First. The evidence relating to the payment of the insurance policy to the administrator of the estate of McGrew should have been admitted. (Fol. 114, exception I.) This evidence was pertinent, for the following reason: From the testimony of Mrs. McGrew it appears that there is surviving Henri McGrew one child. (Fol. 185.) If the divorce decree was not final, as is claimed by the respondent, Mrs. McGrew was one of the heirs of Henri McGrew at his death, she being still his wife. He died intestate, and therefore, by the laws of succession of the State of California, Civil Code, sec. 1386, his estate would go to his child and the respondent in equal shares. The laws of succession of Hawaii not being introduced in evidence, must be presumed to be the same as those of California. The payment, therefore, to the administrator of his estate was admissible as against Mrs. McGrew, because it was a payment to her. If,
116 therefore, she gets the full amount of the policy by this judgment, and one-half of the amount of the policy by the payment in Hawaii, the defendant will be obliged to make a payment twice to the same party. This can be characterized by no other name than judicial robbery. We submit, the evidence was clearly admissible, at least for this purpose.

Second. The court erred in overruling the objection of the defendant to the introduction of the bill of exceptions in the divorce proceedings (fol. 141). (Specification 10, fol. 228.) The ground of the objection was fully stated, viz., that the court of last resort of Hawaii had already passed upon the finality of said judgment, and that its decision in that regard was conclusive upon this court.

Third. The court should have sustained the objection of the defendant to the introduction of the rules of practice adopted by the circuit court of Hawaii relative to the filing of bills of exception with the clerk (fol. 159). These rules of practice were simply the rules of court, and were not embodied in any statute. The supreme court of Hawaii, in Carter *v.* Mutual Life, had said that the judgment became final—notwithstanding the alleged bill of exceptions. This decision cannot be overturned by a rule of court for the same authority that made the rule can set it aside.

Fourth. The court erred in overruling the objections to the evidence of Mrs. McGrew relative to her departure from Honolulu. (Exceptions numbers 6, 7, 8, and 9, fol. 163 to 171). We have
117 already attempted to show that the physical presence of Mrs. McGrew in Hawaii could, by no possibility, have had any effect upon the decree of divorce. If that decree had any application to her personal estate, it would so operate whether she was then domiciled in California or in Honolulu. The opinion of the trial court was based solely upon the fact of this removal. We claim, therefore, that its admission in evidence is, under any possible aspect of the case, reversible error.

The argument thus far made is, of course, quite independent of the legal fiction that the domicile of the husband is the domicile of

his wife. The court below held that section 129 of the Civil Code permitted Mrs. McGrew to acquire a separate domicile from her husband after the commencement of the divorce proceedings by him. The section is as follows:

"In actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation each may have a separate domicile depending for proof upon actual residence and not upon legal presumptions."

The application of this section to the case of a guilty wife in divorce proceedings, has not, so far as we know, been determined. The general rule is, we believe, that if the wife be first in fault, she cannot acquire a separate domicile.

5 Enc. of Law, 756;
Harrison *v.* Harrison, 20 Ala. 329;
118 Burlen *v.* Shannon, 115 Mass. 431;
Kashaw *v. Id.*, 3 Cal. 312;
Beard *v.* Knox, 5 Cal. 257.

The section of the civil code may not change this rule; it may simply be a declaration of a principle now firmly established, that, for the purpose of bringing an action for divorce, the domicile of the wife may be different from that of the husband, a principle which has been found necessary, on account of the many divers jurisdictions within the United States. If this section is not applicable, then the domicile of Mrs. McGrew, notwithstanding her physical presence in California, continued in Hawaii until some time after the divorce decree.

The finding of the court is that, upon the day of her departure, she had no home in Honolulu. The evidence shows that she had been excluded from the house in which she formerly lived. It does not show that she could not have obtained a home elsewhere in that country. Her motives in leaving Honolulu were, as she stated, two; first, to retain her child; and, second, because she had no home there. The first ground cannot avail her, because the custody of the child was prayed for in the complaint, and she then had no right to deprive that court of its jurisdiction over the child. She surely cannot profit by her own wrong in this respect. Nor is her second motive sufficient, because it does not appear that she made any efforts to obtain money by a petition to the court until June, from
119 which time it was paid her. (Fol. 100–180.) With this allowance she could have secured suitable accommodations. Having thus neglected to make the only demand upon her husband, which was proper under the circumstances, it should not avail her to claim that she had no home in Honolulu, because she did not choose to assert her rights. She should not be allowed to make this neglect a ground for leaving the country pending the progress of the suit.

It is respectfully submitted:

(1.) If this court concludes that the decree of divorce operated to pass title in the insurance policy to Henri McGrew, then the conclusions of the trial court (fol. 62) were erroneous and the judgment

should be reversed, with directions to enter a judgment in favor of the defendant, for since this case is practically heard upon an agreed statement of facts, it is plain that such conclusion must be determinative of the whole matter.

(2.) If this court should be of opinion that the insurance policy did not pass by the divorce decree, nevertheless the judgment should be reversed on account of errors in the admission and exclusion of evidence.

CHICKERING, THOMAS & GREGORY,
Attorneys for Appellant.

119½ Due service of the within is hereby admitted this 1st day of February, A. D. 1898.

PLATT & BAYNE,
Attorney- for Respondent.

W. E. B.

120 San Francisco, No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Points and Authorities.

Platt & Bayne, attorneys for respondent.

Filed this Feb. 14, 1898, *day of February, A. D. 1898.*
T. H. WARD, *Clerk,*
By E. S. BUTTERWORTH,
Deputy Clerk.

W. E. B.

120½ In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Points and Authorities.

Statement of the case.

Respondent and Henri G. McGrew were husband and wife on the 14th day of September, 1892. On that date the appellant issued a policy of insurance upon the life of said Henri G. McGrew, payable to "Alphonsine McGrew, wife of Henri G. McGrew," the said respondent.

On the 22nd day of October, in the year 1894, said Henry G. McGrew died. Respondent thereupon brought suit upon this policy in the superior court of the city and county of San Francisco,
121 and recovered a judgment thereon against appellant. From this judgment this appeal is taken.

On the 20th day of December, in the year 1893, respondent and her said husband were residents of Honolulu, Hawaiian islands, and on that date they returned to Honolulu from California, whither they had gone on a visit for the benefit of his health. Upon their arrival in Honolulu, a Mr. Carter met them at the steamer, compelled them to go to a hotel, and refused to allow respondent to go with her husband and their child to their home. She and her husband had then a home in Honolulu, but this Mr. Carter had the key and refused to permit her to enter it, though her clothes were there. Soon thereafter Henri G. McGrew was adjudged an incompetent person, he having softening of the brain, and this Mr. Carter was appointed his guardian. He then caused him to be removed to a hospital, told respondent to go where she liked, refused to give her any money for the support of herself and child, advertised in the newspapers that her husband would not be responsible for her debts, sold all the furniture in her home, and refused to allow her to enter it. She was then entirely without a home or the means of support, and was compelled with her young child to accept the hospitality of a friend.

On the 8th day of February, in the year 1894, the said guardian brought suit for divorce on behalf of his said ward against respondent in the circuit court in Honolulu on the ground of her
122 adultery. Process in that suit was immediately served upon her, and she appeared in said action by her attorney.

On the 5th day of April, 1894, respondent, being without any home and fearing that her child would be taken from her, left Honolulu for California with the intention of making her home in California, did make her home in California, and never returned to Honolulu. (She paid the expenses of this trip out of the proceeds of the sale of a piano, the only property that she had left.)

On the 23rd day of August, in the year 1894, and while respondent was residing in California, a judgment of divorce as prayed for was rendered against her in said action. Respondent's attorney, owing to the absence of the judge of said court, filed his bill of exceptions to this decision with the clerk of said court. Under the rules of said court this was the proper procedure, and it then became the duty of said clerk to present this bill for certification to the judge on his return. This judge did not return until after the death of said Henri G. McGrew, and this bill has never been certified by him.

At the time when this judgment of divorce was rendered, there was in force in the Hawaiian islands a statute which provided as follows:—

"When a divorce is decreed for the adultery or other offence amounting thereto of the wife, the husband shall hold her personal estate forever."

123 Appellant claims that, under this decree of divorce, this policy of insurance vested in the husband, and, therefore, that respondent is not entitled to recover thereon.

Appellant, on pages three to five of its brief, states that, after said judgment of divorce was rendered, an action was begun in Honolulu

by the administrator of the estate of Henri G. McGrew against appellant to recover upon this policy; that judgment was rendered in said action in favor of said administrator and against this appellant; that this judgment was affirmed by the supreme court of the Hawaiian islands, and that this appellant has been compelled to pay, and has paid under said judgment, the money due on said policy. It offered testimony to prove these facts, but this testimony was not admitted by the lower court, upon the ground that respondent was not a party to said action, and was not, therefore, bound by said judgment.

Respondent claims that the only material question involved in this present appeal is the effect of the above-mentioned Hawaiian statute upon her title to this property.

Appellant's counsel has argued at some length upon the finality and effect of this judgment of divorce. We do not consider the finality of this divorce material on this appeal. If the above statute could not operate at the time the divorce was decreed, so as to divest respondent of her title to this policy, it is immaterial whether the divorce became final or not, or whether it must be recognized by the courts of this country or not.

124 *Argument.*

First point.

Conceding, for the purpose of this argument, that the said decree of divorce became valid and final before the commencement of this action, we submit that neither the Hawaiian statute (Trans., fol. 117), nor the Hawaiian decree of divorce (Trans., fol. 109), divested respondent of her ownership of this policy of insurance.

I.

The statute did not accomplish this result because it has no extra-territorial effect, and is one that the courts of this State will not enforce against a person domiciled in California.

First. It is contrary to the policy of California and its laws.

It is universally admitted that a statute of any country is not valid in any other country, except to the extent permitted by the other country under the doctrine of comity, and that this doctrine of comity never obtains when the foreign statute is contrary to the policy of the country in which it is sought to be enforced.

3 Am. & Eng. Ency. of Law, p. 505;
Sutherland on Statutory Construction, p. 12;
Story on Conflict of Laws, sections 22, 23, and 98;
In re Dalpay, 41 Minn. 534;
St. Louis Railway *v.* Brown, 35 S. W. 226;
Whitney *v.* Dodge, 105 Cal. 199.

125 (1.) This statute is contrary to the policy of our laws because it provides for a forfeiture.

It provides that, when a divorce is decreed for the adultery of the wife, her husband shall hold her personal estate forever. This is a

forfeiture, and is so declared by the Hawaiian court, in the opinion rendered upon the rehearing of the case of Carter against the insurance company (Carter *v.* Mutual Life Ins. Co., 10 Hawaiian Reports, —). In that opinion the court said, speaking of this statute: "It may be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery."

The policy of our law is to disfavor forfeitures. The Civil Code, section 1442, provides that a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Our supreme court, in People *v.* Perry, 79 Cal. 112, stated that provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as they ought to be, construed as strictly, or as liberally as possible, against the forfeiture.

(2.) This statute is contrary to the policy of our laws, because it is an effort to add to the divorce laws of the Hawaiian islands a provision disposing of the wife's separate property when the divorce is upon the ground of her adultery.

Our supreme court, in Reid *v.* Reid, 112 Cal. p. 274, ex-
126 pressly held that the court, in an action for divorce, has no jurisdiction over the separate property of the wife. The policy of our law is to protect the wife in her separate property, under any and all circumstances, making it liable only under her contracts, and never as a penalty or forfeiture for her bad conduct. Our law provides that when a divorce is granted for the offence of the husband, the court may compel him to provide for the support of his wife during her life, or for such period as the court may deem just, having regard to the circumstances of the parties, respectively, and it has provided for the disposition of the community property, in the event of the adultery or extreme cruelty of either party; but it has made no provision as to the disposition of the wife's separate property on a divorce for any cause. There is but one provision of
W. E. B. law wherein the code attempts to take from the wife her separate property, other than under her contracts, and that is found in section 143 of the Civil Code, providing for the support and education of children. This statute, therefore, interferes with the policy of the California law, and is contrary and antagonistic to it, and, therefore, will not be enforced in California.

Second. This court will refuse to enforce this statute, not only because it is contrary in spirit to the policy of the laws of California, but also because it is a penal statute of a foreign country.

A statute which imposes a liability that is neither created
127 by contract nor given as compensation for a direct and immediate wrong, which is imposed upon a person as a consequence of the doing or omission of an act, and which is not measured by any injury flowing from the act or omission, and which is in the nature of a punishment, is a penal statute. The object of such a statute is to inflict a punishment for doing what is prohibited or for failing to do what is commanded.

Kleckner *v.* Turk, 63 N. W. 473 (Nebraska);
Globe Pub. Co. *v.* Bank, 41 Neb. 181;
Diversey *v.* Smith, 103 Ill. 378;
Kimball *v.* Davis, 52 Mo. Appeals, 212.

The proposition is well settled that penal statutes are local, and are not enforced on any principle of comity outside of the jurisdiction enacting them, and this is true whether the remedy afforded is to an individual or to the State.

Kimball *v.* Davis, *supra;*
Cook on Stockholders, section 223;
Derickson *v.* Smith, 27 N. J. Laws, 169, 173, 177;
Blaine *v.* Curtis, 59 Vt. 120;
Russell *v.* Railway, 113 Cal. 261;
Phillips *v.* Madrid, 83 Me. 205;
Ferguson *v.* Sherman, 47 Pac. Rep. 1024–'5, (Cal.);
Dale *v.* Atchinson, 47 Pac. Rep. 523 (Kansas).

W. E. B. In this last case an attempt was made in Kansas to enforce a statute of New Mexico which authorized a
128 recovery from a railroad company of $5,000.00 by certain designated persons whenever a person dies from an injury caused by the negligence of an employee managing any train or locomotive. The court held that the courts of Kansas would not enforce this New Mexico statute because it was not strictly compensatory, but was merely penal, requiring the infliction of a penalty of $5,000.00, neither more nor less, irrespective of the real amount of damage suffered. To the same effect are

Marshall *v.* R. R. Co., 46 Fed. 269;
Philpot *v.* R. R. Co., 85 Mo. 164;
Adams *v.* R. R. Co., 30 At. Rep. 687 (Vt.);
Story on Conflict of Laws, sec. 621.

In Langdon *v.* N. Y. R. R. Co., 11 N. Y. Supp. 514, an effort was made to enforce in New York a statute of Pennsylvania inflicting treble damages upon common carriers for any undue or unjust discriminations. The court held that the statute could not be enforced in New York if it was penal in its nature, under the rule that the courts of one State will not enforce the penal statutes of another State, and held that it was a penal statute because it was so enacted as to provide a punishment as distinguished from an indemnity. (See the numerous authorities cited on page 517 of this report, and also in 9 N. Y. Supp. 247.)

This Hawaiian statute comes clearly within the definition of a penal statute as derived from these authorities, and this is
129 admitted by the Hawaiian court in its opinion upon rehearing in the case of Carter against this Insurance Company wherein it says that this statute "may be regarded as a penalty or forfeiture in case of a divorce for the offence of adultery." This court will not, therefore, enforce this penal statute of a foreign country.

Third. The respondent was domiciled in California at the time when, it is claimed, the statute worked a forfeiture of this policy of insurance.

It is the accepted doctrine that personal property is governed by the law of the domicile of the owner.

Whitney *v.* Dodge, 105 Cal. 197;
3 Am. & Eng. Ency. of Law, 567, 568;
Story on Conflict of Laws, section 472.

The domicile of respondent when, it is claimed, this statute worked this forfeiture, was in California. This statute, as we have seen, provided that when a divorce is decreed for the adultery of the wife, the husband shall hold her personal estate forever. This policy of insurance was personal estate, and under this statute, it could become the property of the husband only when a decree of divorce for adultery of the wife was rendered.

It is admitted that the domicile of respondent at the commencement of the action for divorce, and when the court obtained jurisdiction over her, was in Honolulu, where her husband was then domiciled. We submit that her domicile changed, either
130 when she left Honolulu on the 5th of April, 1894, or when the decree of divorce was rendered on the 24th of August, 1894.

(1.) Her domicile changed when she left Honolulu.

The rule that the wife's domicile is that of the husband is, like all other rules of law, governed by the maxim that when the reason ceases, the rule ceases.

Derby *v.* Derby, 14 Ill. Ap., 647.

The Illinois court, in this case, quotes with approval from Colvin *v.* Reed, 55 Penn. St., 375, the following: "The unity of person created by marriage is a legal fiction, to be followed for all useful purposes, and not to be used to destroy the rights of either, or contrary to the principles of natural justice, in proceedings which, from their nature, make them opposite parties. It required their mutual consent to establish the relation from which that unity arises, and the same law of right demands them to be viewed in their separate natural condition, when either proceeds against the other to destroy their relation. It is the necessary effect of their being opposite parties to the proceeding."

In Mellen *v.* Mellen, 10 Abb. New Cases, 331, the court said: "When the husband began his action to dissolve the marriage contract, the theoretic identity of person and interest ceased to
131 exist, and the legal fiction of the one domicile no longer operated." This language is quoted and approved in Hewes *v.* Hewes, 16 N. Y. Sup., 119.

This doctrine, so well expressed by the Illinois, New York, and Pennsylvania courts, fits the facts of the case at bar. When the husband closed the doors of the home upon the wife and refused to allow her to enter this home; when he sold out their household furniture without her consent, and in the face of her objections; when he turned her adrift upon the street with her child, without money, and prevented her from obtaining the necessaries of life at his expense by publishing warning notices against her in the public

papers, when he destroyed the fiction of marital unity by bringing an action for divorce against her on the charge of adultery, surely the reason for the existence of this fiction of marital unity of person and domicile ceased, and the necessity arose for the wife's obtaining a separate domicile of her own. We say, "when the husband" did these things, because these acts of his guardian were his acts, if the bringing of the suit for divorce by the guardian was his act.

There was no reason why she should choose to retain his domicile. There was every reason she should seek an independent one of her own. In the town of Honolulu she was evidently in the midst of interests adverse to herself; she feared, and had reason to fear, that her infant child would be taken from her; she was charged with a very serious marital offence, and had, therefore, reason for
132 leaving such a restricted country, and for seeking a home of her own beyond the seas, and in a country where the laws as to married women are more in consonance with justice and humanity. Furthermore, her husband was practically dead, his reason had fled, he was no longer to her or his friends a living being, other than merely in the flesh. He was apparently, and, as it turned out, really afflicted with an incurable attack of softening of the brain. He had been adjudged an incompetent person, and the care of his person and estate put out of her hands and into the hands of a guardian. She was denied access to him. He was, therefore, no longer in fact her husband, either in mind or body. This was an additional very strong reason, which, coupled with the others, justified her in choosing an independent domicile. Appellant contends that respondent was excluded only from the house in which she formerly lived, but that the evidence does not show that she could not have obtained a home elsewhere in that country, and that, if she did not have a home in Honolulu, it was because she did not choose to assert her rights. The testimony shows that she asked her husband's guardian to give her a home and some money, and that he told her that he had no money to give her, that he could give her no home, that she could go where she liked, but that he would give her money to leave the country if she would give up her child (Trans., fol. 183–185). It would seem that this was sufficient to destroy such a mythical illusion as the fiction of unity of domicile of husband and wife.

133 (2.) Her domicile changed when the divorce was decreed, if it did not change before.

If, however, she was not enabled by these circumstances to change her domicile in law, prior to the decree of divorce, this domicile did change in law the moment the decree was obtained, because the decree ended the marriage, and, therefore, ended the fiction of the one domicile, and the new domicile that existed in fact became thereby instantaneously the new domicile in law. On the instant of the rendering of the decree she was free from the bonds of matrimony, and at liberty to change her domicile. On that instant, if not before, her domicile was in law changed. Her domicile did not continue in Hawaii an instant after the decree took effect.

It is claimed by appellant that this Hawaiian statute took effect

simultaneously with the decree of divorce, because it provides that when a divorce is decreed for the adultery of the wife, the husband shall hold her personal estate forever. It cannot, of course, be denied that the decree of divorce itself ended the fiction of one domicile, and that, as respondent, when the decree of divorce was rendered, was actually a resident in California, with the intention of remaining here, therefore her change in domicile in law was co-existent with the rendition of the decree of divorce. The most, therefore, that can be claimed by appellant is that the decree of divorce, the legal change of domicile, and the taking effect of
134 the statute were simultaneous. This court, therefore, must give precedence to either the change of domicile, or the taking effect of the statute, as the statute, not having any extraterritorial effect, cannot take effect upon this insurance policy, unless it took effect prior to the wife's change of domicile. In such a dilemma this court's course is very easy of determination, as the courts of this country, not only under the decisions above mentioned, but under our civil code, always defeat a forfeiture, if possible. Under this rule, as the statute attempts to work a forfeiture, our court must give precedence to the change of domicile, and thus prevent a forfeiture.

(3.) There is nothing in our code that militates against this change of domicile. Section 129 of the Civil Code provides that "after separation, either husband or wife may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions."

The learned counsel for appellant contends that this provision of the code may simply be the recognition of a general principle, now firmly established, that, for the purposes of bringing an action of divorce, the wife may have a different domicile from the husband. The answer to this contention is, that this same section in another clause thereof recognizes this general principle, by providing that "in actions for divorce the presumption that the domicile of the husband is the domicile of the wife does not apply." Is not
135 this section of the code rather a recognition of the principle set forth in Derby *v.* Derby, 14 Ill. Ap. 647, *supra*? Is it not a recognition of the modern and true doctrine that, as the legal unity of husband and wife is only a fiction of the law, this legal fiction ends when the unity in fact is broken up by actual separation?

If a wife may obtain an independent domicile for the purpose of suing for divorce, and thus complete the destruction of the home, why may she not obtain an independent domicile in order to obtain a home?

If the husband cannot desert his wife, move into another jurisdiction, and then, in an action against her for divorce, treat her domicile as having in law followed his, why should he be allowed to drive her from his home, and still in law chain her domicile to his?

II.

The decree of divorce did not work a divestiture of respondent's title to the policy of insurance.

Appellant, in its brief, argues very strenuously that the title to the personal estate of the respondent was determined by the decree of divorce, and that the determination of this title by this decree was an incident of the divorce that must be recognized wherever the divorce is recognized.

Appellant's entire argument upon this branch of the case is based upon the assumption that the Hawaiian court in the divorce case had jurisdiction over the personal property of respondent,
136 because it acquired jurisdiction over her personal status. We must respectfully submit that this assumption begs the whole question.

Under the decision of the Hawaiian court in construing this Hawaiian statute as to forfeiture of the wife's property for her adultery (Carter *v.* Mutual Life Insurance Co., *supra*), the wife's property vests in the husband, not under the decree of divorce, but under the statute. The Hawaiian court in the opinion above mentioned said that this right of the husband to the wife's personal property, when she is divorced for her adultery, "is not a marital right," but "is one of property under the statute." Without this statute the right would not exist. This decision is in accord with the authorities cited by appellant in its brief (pp. 16–18). In Bamford *v.* Failing, 4 Oregon 30 (cited by appellant), the court, in construing an Oregon statute providing for the division of property consequent upon divorce, said "the desired result would be produced by the law, and not by the formal words of the decree."

Although this statute may make this forfeiture of the wife's personalty, practically in Hawaii, an incident of the Hawaiian divorce, it is not such an incident elsewhere, as the statute does not operate extraterritorially.

There may be incidents to a decree of divorce which obtain in the jurisdiction where it is rendered, but do not obtain in foreign jurisdictions.

The United States circuit court in the case of Barrett *v.* Failing, 6 Sawyer, 479–480 (cited by appellant), lays a special emphasis
137 upon this distinction. In that case, under the law of Oregon, upon the dissolution of the marriage on account of the adultery of either party, the innocent person was entitled to a certain interest in, or portion of, the property of the other. The facts of this case showed that a divorce was obtained by the wife in California, and that she subsequently attempted to enforce this decree of divorce in Oregon as against certain real property there situate that had belonged to her husband, claiming that, under the law of Oregon, she had certain rights in said property accruing from said divorce. The circuit court said that, while admitting that the decree of the California court was valid in Oregon as a decree of divorce, the law of California, unlike that of Oregon, did not provide that a decree of divorce should work a transfer or forfeiture of one-third of

the real property of the one party to the other, and that, if it did so provide, it could have no extraterritorial effect, but would be confined in its operation to the property of the parties within the State of California; and that the plaintiff's decree of divorce, although valid and effectual as such, could have no operation or effect upon real property in Oregon, except with the consent of the State of Oregon, declared in its laws.

Appellant cites Story on Conflict of Laws, section 230*b*, as announcing the law to be that a foreign divorce has all the effect in every other country upon personal property locally situate there, which is properly attributed to it in the forum where it is
138 decreed. In support of this statement the learned author cites only an opinion of Brougham in an old English case, wherein the only point at issue was the right to divorce. In this opinion there is a long rambling discussion upon the general subject of the legality of a divorce in one country, of parties married in another country, but the case does not justify the above unqualified statement of Story. The utmost effect that a divorce in one jurisdiction can have upon property in another is that a valid divorce may be held to terminate certain property rights that are dependent alone upon the continued existence of the marriage state, and this, independent of the situs of the property. Dower is one instance of such property rights. It is a property right arising from marriage and dependent upon the continuance of marriage during the life of the husband. Its assertion depends upon proving such marriage and continuance. The ownership of the policy of insurance in this case is independent of the marriage or its continuance. The proof of a marriage would not prove the respondent's ownership. This ownership did not arise out of the marriage status. The proof of a divorce alone would not show the termination of her ownership. This latter fact depends upon an independent statute without which the divorce is immaterial. In this regard there is a clear distinction between property rights arising *ex natura rei* out of the marriage relation and ending, necessarily, with the termination of the marriage relation, called marital property rights, and all other property rights.

139 The universally recognized rule that personal property is governed by the law of the domicile of its owner is not modified by this statement of Story's, even were it supported by any decisions. If the owner of personal property were domiciled at the time of a decree of divorce within the jurisdiction of the forum rendering the divorce, the laws of such forum would most probably control as to the personal property of such parties, though said property were situated in a foreign country; but, the fact of the domicile of the parties to a divorce case at the time of the rendering of the decree is the essential fact to the obtaining of such jurisdiction over the personal property so situated.

If the respondent's domicile had been in Honolulu when this statute took effect, the statute might have operated to vest in the husband her personal property, because in law it was there situated. As, however, her domicile was not in Honolulu at this time, her

personal property was not in law there situated, and therefore this statute could not operate extraterritorially to vest in the husband her personal property situated elsewhere.

Appellant's contention that the husband's right to this policy was an inchoate right, vesting under this statute when jurisdiction was obtained over respondent in the divorce case, and that therefore he had a qualified ownership in this policy prior to the decree and while she was in Honolulu, is without foundation.

As this statute is a penal statute, it could have been re-
140 pealed pending the divorce proceedings without affecting those proceedings or depriving the plaintiff in that case of any right of property then vested in him, and yet this repeal would have taken away this right of forfeiture.

Kleckner *v.* Turk, 63 N. Y. Rep. 413.

Any right conferred by this statute was not, therefore, an incident to the divorce proceeding necessarily attaching when the case was begun, and to be effective if conducted to a successful conclusion. Any such right was purely a punishment that could become operative only when the decree was rendered, provided the statute was then unrepealed, and then not by virtue of the decree, but only by virtue of the statute. It is not true, therefore, as claimed by defendant, that respondent brought only a qualified ownership in this policy when she came to this country. This policy did not come here with any law impressed on it.

Appellant cites Forbes *v.* Scannell, 13 Cal. 242, in support of his contention that this policy was brought to California impressed with this Hawaiian law. The citation does not support his contention. That case concerned property that had been assigned while at sea by an assignor residing in China to an assignee there residing, and of which almost immediate possession had been taken under the assignment. The property subsequently came into this State with the full effect of the executed contract made abroad impressed upon it.

It was contended in Forbes *v.* Scannell that the foreign as-
141 signment was opposed to the policy of this State, and the court said that there would be more force in this point if there had been an executory agreement to make such an assignment in this State, or if the property had been within this State at the time of the assignment, but that the property and the parties were both out of this State when the contract was made and executed.

Appellant contends that jurisdiction was acquired over this policy, and lays much stress upon the rule that when jurisdiction has once attached, a subsequent change of domicile cannot affect this jurisdiction. This rule we concede. The change of residence of respondent, pending the divorce proceedings, did not operate therefore to divest the court of jurisdiction over this policy, because it had not then any jurisdiction over it, nor would it have had jurisdiction over it had she remained in Honolulu until the decree. Title to this policy, even then, would have been dependent on this statute alone. We, therefore need not, nor do we claim, that the change of

residence on the part of respondent in any way affected the jurisdiction of the court in the divorce case.

The learned counsel for appellant has cited the insolvency law, and supposes the case of an insolvent, after the filing of a petition in insolvency, and before the adjudication in insolvency, removing a part of his property to another State, and cites this as analogous to the act of respondent in removing from Honolulu to California pending the divorce proceedings, and in bringing with her this claim against the insurance company.

142 The two cases are not analagous. The proceeding in insolvency is one by creditors to establish their claims against the property of the debtor, and the filing of the petition gives the court jurisdiction of the subject-matter of the insolvency, but not of the person of the insolvent. The order of the court made at the time of the filing of the petition forbidding the debtor to transfer any of his property, is in the nature of a provisional attachment, or sequestration of his estate, and brings it under the control and dominion of the court. The property of the debtor is from that moment considered in the custody of the court, and, hence, the adjudication of insolvency necessarily relates back to the filing of the petition.

Daily *v.* Superior Court, 61 Cal. 402;
State Investment Co. *v.* San Francisco, 101 Cal. 135;
Bude *v.* Cooper, 109 Cal. 687.

But, even in insolvency proceedings, the transfer of the debtor's property by operation of law, being *in invitum*, does not affect property not actually situated in the State where the law was enacted.

Kelly *v.* Crapo, 6 Am. Rep. 36.

In a proceeding for divorce, in the absence of any provision of law sequestrating or taking into the custody of the court the property of the parties to the divorce case, or if the court does not, under its general equity process, appoint a receiver of said property,

143 the court acquires no jurisdiction over the property of either party. By service of process upon the defendant, or by his or her appearance, it acquires jurisdiction only over the person and personal status of the parties, and can enforce obedience to its orders, prior to final decree, only by process of contempt. Either party may, prior to the decree of divorce, dispose of his or her property, and our court has held, in Greiner *v.* Greiner, 58 Cal. 121, that neither party, pending the divorce case, can prevent the other from so disposing of his or her property. The divorce proceedings of themselves do not operate as a *lis pendens;* nor do they, in the absence of the appointment of a receiver, or of any statute, operate to take the property of either party into the custody of the court, or to give the court jurisdiction over the property of either party. The first moment when the arm of the court reaches out to affect the property of either party is when the lien upon the real property of either party is created by the judgment of the court awarding alimony or distributing the property under the statute.

Nelson on Marriage and Divorce, secs. 939 *et seq.*
Civil Code, secs. 136 to 148.

All of appellant's authorities, including the citation from Platt on the Property Rights of Married Women (a work we appreciate), are based upon the admitted rule that when title to property is
144 once vested, the removal of that property, or of the owner thereof, to another jurisdiction, cannot operate, by reason of any conflict of law, to divest the title of such property so vested. Our contention in this case, however, is that, prior to the decree, the title to her personal property was not vested in the husband; that the decree did not purport to so vest it; that the statute alone assumed this burden, and that it could not have that effect after her change of domicile, as the statute could not operate retroactively to affect property rights as of the time of the appearance of the defendant or service of process upon her in the divorce proceedings, and that, therefore, her husband had neither a lien on, nor any right to, or ownership in, said property when she left Honolulu.

Appellant lays much stress upon the distinction between executory and self-executing statutes, and claims that this was a self-executing statute. This distinction fades when a foreign court is called upon to enforce either as to property in the foreign country. No statute is self-executing except in its own country. It is only between executory and executed contracts that any distinction obtains in foreign courts, and in this distinction we are not now concerned.

In Hawaii this statute is self-executory. In California it can be executed only by a judgment of a court. The mere fact that in Hawaii an Hawaiian statute is made self-executory upon the rendering of a decree, cannot give this statute any extraterritorial effect.
145 If the husband should bring replevin for his wife's personal property after a decree of divorce for her adultery, and, in an Hawaiian court, he need plead only the decree, and the court would take judicial notice of the statute and enforce it. If he were to bring this same action in a California court, he would be nonsuited unless he pleaded and derived title under the statute, and prayed that it be adjudged that title had vested in him under the statute. This is exactly what the appellant insurance company must do in this case.

Appellant cites Hilton *v.* Guyot, 159 U. S., 202, as authority for the proposition that if Henri McGrew had followed the respondent to California, and brought replevin against her to recover physical possession of the policy, he could have produced the divorce decree, and the California court would have been compelled to treat it as a judgment *in personam* as regards property, operating as a valid transfer of this policy, and so enforce it (the judgment) against this policy. Hilton *v.* Guyot sustains no such proposition. It is authority only for the rule that our courts will not enquire into the merits of a foreign judgment against a citizen of this country, if there was opportunity for a full and fair trial before a court of competent jurisdiction, after due citation of the defendant or voluntary appearance under a system of jurisprudence likely to secure impartial justice to strangers, and there was nothing to show prejudice or

fraud. It does not pretend to hold that the courts of this
146 country will, from comity, enforce a penal statute of another country simply because that statute provides certain consequences resultant upon a foreign judgment, and not included in the terms thereof, or that the courts of this country will enforce the provisions of a foreign law simply because they will not from comity, and under certain circumstances, enquire into the merits of a foreign judgment.

We do not consider it material to discuss the question as to whether this court can enquire into the merits of the decree of divorce or its validity or finality. The statute providing for the forfeiture of her property cannot be enforced against her under the circumstances of this case, and therefore it matters not as to the divorce. Moreover, as death has certainly divorced her, it could not benefit her to set aside the Honolulu divorce. We must, however, dissent from the statement in appellant's brief that she "was given a fair and full trial abroad, before a court of competent jurisdiction." The action was begun and prosecuted by the guardian of the husband, contrary to the unbroken line of decisions. No decision can be found anywhere authorizing such a suit, unless under some statutory provision.

Nelson on Divorce and Separation § 729;
2 Bishop on Mar. Div. and Sep. § 523 to 525.

The dissenting opinion in McGrew *v.* McGrew, 9 Hawaiian Rep.
478, demonstrates the unfairness and weakness of the Ha-
147 waiian court's decision in that case. But not only was this unusual procedure sanctioned, but the court went further and refused to issue any commission to take the deposition of respondent in her own behalf. She had left the country in order to keep the custody of her child, and was afraid to return to testify. We do not think, therefore, that the judgment commends itself to our jurisprudence.

We do not think that the treaty between the United States and Hawaii helps the appellant. This treaty provides "that the rights to the personal property of a citizen of either country must be decided finally by the laws and judges in the land wherein the said goods are situated." This is very strong authority for respondent's contention.

Second point.

(1.) A special finding upon the finality of the decree of divorce was not necessary. The findings cover all the proceedings in the action for divorce, and both the Hawaiian laws, and the decisions governing these proceedings, were offered and admitted in evidence. Whether the judgment of divorce was final or not is therefore a conclusion of law. If, however, it be held to be one of the ultimate facts, the absence of any finding thereon is not a reversible error, if respondent's foregoing position be sustained, as, under such a construction, a finding that the judgment of divorce was final would not be sufficient to reverse the judgment from which this appeal is taken.

Morrison *v.* Stone, 103 Cal. 104;
Moore *v.* Copp, 51 Pac. Rep. 630.

148 (2.) The court did not err in refusing to admit evidence of the payment of the insurance policy to the administrator of the estate of Henri G. McGrew. Under the Hawaiian law (section 1448, Compiled Laws of 1884) the child of respondent and Henri G. McGrew was his sole heir. This law was proven in the case and proven by appellant. On page 28 of the transcript, folio 83, is found the following:

"The defendant, to sustain the issues on its part, thereupon introduced the following testimony, which, by stipulation of the parties, had been agreed to be true, subject to any objection thereto which might be made at the trial.

* * * * * * *

"XVIII.

"That a volume entitled 'Compiled Laws of the Hawaiian Kingdom,' and known as 'Compiled Laws of 1884;' and a volume entitled 'Laws of Her Majesty Lilioukalani, Queen of the Hawaiian Islands, Passed by the Legislative Assembly at its Session, 1892,' and known as 'Session Laws of 1892;' and also volumes I to IX of the 'Reports of Decisions Rendered by Supreme Court of the Hawaiian Islands,' are each published by authority, and are received and used in the courts of the Republic of Hawaii as evidence of the laws of said Republic."

If, however, this Hawaiian law had not been introduced in
149 evidence and this court were bound, as appellant claims, by the presumption that the Hawaiian law is the same as the California law, and that, therefore, the respondent would be an heir of Henri G. McGrew, supposing there had been no divorce, still any payment of this policy by the appellant to the administrator of the estate of Henri G. McGrew would not be binding upon her, if the policy is hers. A payment to the administrator of the estate of B of a debt due to A cannot be competent evidence in a suit by A against the debtor to recover this debt, even though A might be an heir of B. The administrator of B might and would have the right to pay out all of this money in satisfaction of the ex-
W. E. B. penses of administration, and of the debts of B, and A would have no redress. Furthermore, a debtor cannot justify the payment of a debt to the wrong person merely because perchance it may eventually go to the right creditor by virtue of inheritance.

In the case at bar the money is alleged to have been paid to the administrator of the estate of Henri G. McGrew, not as the money of respondent, but as the money of said McGrew. There was no testimony offered showing whether all of this money, or how much, has been expended in paying said McGrew's debts or the expenses of administration. If the testimony as to this payment had been admitted, it would have been proven (if it was not proven) that respondent was not his heir (even if there were no divorce). The error, therefore, if it was error, is not a reversible one.

150 (3.) The court did not err in admitting in evidence the bill of exceptions in the divorce proceedings or the rules of

practice of the circuit court of Hawaii relative to the filing of bills of exceptions. These were facts material as to the finality of the decree of divorce. This decree has not been declared final by any court in Hawaii, except collaterally, in the suit of Carter *v.* Mutual Life Insurance Co., to which respondent was not a party.

(4.) The court did not err in overruling appellant's objections to the testimony of respondent. Her testimony so objected to went to the gist of her case.

We, therefore, submit:—

I.

That the decree of divorce did not operate to divest respondent's title to the policy of insurance.

II.

That under the Hawaiian statute alone could this divestiture occur, and it did not occur under that statute, because,—

(1.) Said statute, under its terms, could not take effect until the decree of divorce was rendered;

(2.) When the decree of divorce was rendered respondent was domiciled in California;

151 (3.) This policy, being a chose in action, followed respondent, and is controlled by the law of her domicile, and her domicile changed from Honolulu to California, either (1) when she left Honolulu on the 5th day of April, 1894, with the intention of not returning to Honolulu, because of the suit of divorce begun by her husband, and of her being excluded from her home by her husband; or, (2), when the decree was rendered, because the decree of divorce itself terminated the fiction of unity of person and interest, and allowed her California domicile, which existed in fact, to become her California domicile also in law. This change of the domicile so caused by the decree of divorce, was, in point of time, prior to the taking effect of the adultery statute, as the California law will give it priority in order to avoid a forfeiture.

(4.) Said statute could not take effect upon this policy of insurance after her change of domicile to California, because, (*a*), being a foreign statute, it has no extraterritorial effect; (*b*), it is contrary to the policy of our law, in that it works a forfeiture, which our laws endeavor to avoid, and also attempts to deprive the wife of her separate property in an action for divorce, whereas our law has in every way prohibited such a disposition of her property; and (*c*), it is a penal statute of a foreign country.

The judgment should be affirmed.

Respectfully submitted,

PLATT & BAYNE,
Attorneys for Respondents.

151½ Due service of the within is hereby admitted this 14th day of February, A. D. 1898.

CHICKERING, THOMAS & GREGORY,
Attorney for Appellant.

W. E. B.

152 San Francisco, No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Reply.

Chickering, Thomas & Gregory, attorneys for appellant.
Edward Lyman Short, of counsel.

Filed this Apr. 23, 1898. *day of April, A. D. 1898.*
T. H. WARD, *Clerk,*
By E. S. BUTTERWORTH,
Deputy Clerk.

152½ In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Appellant's Reply.

Counsel for respondent has, for the purpose of argument, conceded that the decree in McGrew *v.* McGrew became final prior to the commencement of the present action. It is, therefore, no longer necessary for this court to concern itself with this proposition, and the first point made by us in opening may be disregarded.

The argument of counsel has now confined the case to this single issue, viz., did the fact that respondent was domiciled in Cali-
153 fornia at the time of the rendition of the decree prevent her personal estate from being affected by the Hawaiian law. One point, however should first be noticed. On page 27, counsel dissents from the statement that Mrs. McGrew was given a fair and full trial abroad before a court of competent jurisdiction, because (*a*) they permitted an action for divorce to be prosecuted by the guardian of an insane person, and (*b*) they refused to issue any commissions to take testimony. The first point we have already answered by showing that this action was prosecuted under a statutory provision which counsel concedes may be done (p. 27). The second point is met by the opinion of the trial judge (fol. 204) by which it appears that it was admitted the witnesses whose testimony was sought to be taken by deposition, would deny the acts charged. This, of course, obviated the necessity of any deposition.

At the outset, we wish to again assert that the question of change of domicile is immaterial. It could make no difference whether Mrs. McGrew could or could not acquire a domicile apart from her husband, and the time when that domicile was changed is equally irrelevant, it being conceded that in any event, it was after the service of process at Honolulu.

Counsel has argued this case throughout as if the statute *ex proprio vigore*, and independent of any judicial proceedings, transferred title. He speaks constantly of the statute "vesting title in
154 the husband," as if it pretended to give to A the property of B without a hearing in court. This is a wrong assumption. The statute simply declares the legal effect of the decree of divorce; it is a section of the chapter in the laws of Hawaii upon the subject of "divorce and separation;" it must contemplate the institution of an action for divorce, because otherwise there could be no decree. Counsel emphasizes the point that the statute did not operate to pass title until the decree was entered. This is so, as in every case property rights are not transferred until judgment, but it does not mean that these property rights may not have been involved in the steps leading up to the decree.

The entry of the decree and the effect thereof, as given by the law, are both necessary to pass title; the two are inseparable, and, therefore, it must logically follow that in every action instituted in that country for a divorce upon the special grounds alleged, the alienation of title of the personal property of the defendant is a necessary incident, and, from the commencement of the action, those personal property rights are necessarily involved, for no decree of divorce on this special ground could possibly be entered, and not have this legal effect.

Counsel say that the law may have been repealed, pending the divorce proceedings. Without admitting the fact, suffice it to say that this law was not repealed during any of the times mentioned, but was in full force both at the time of the commencement of the action and at the time of the rendition of the decree.

155 To repeat, when the divorce action was commenced, respondent's personal property rights were or were not involved in that litigation. If they were, then her change of domicile could not substract anything from that jurisdiction already conferred; if they were not, then the continued domicile in Hawaii could add nothing to that jurisdiction, and the decree could not have affected her property rights, though she remained there.

The argument of respondent would be equally applicable to a state of facts in which it appeared that the libel for a divorce had contained an allegation of the personal property of the wife, and a prayer for its transfer. He would then be obliged to say, as he does now, that the decree did not affect respondent's property rights, because, before it was rendered, she had become domiciled in another country. But to admit such a proposition is to say that any party, when sued for a divorce, can evade the effect of a decree as to property rights, or can escape any liability for alimony, by simply removing to another jurisdiction before the decree is rendered.

Counsel has not referred to our point, which we regard as the essential feature of the case, that by reason of the mandatory character of the statute, it is neither necessary nor proper to refer to property rights, either in the pleadings or in the decree; nor has he combated the proposition that this statute in effect presents precisely

the same question as is involved in those States which give
156 a wife her dower right upon divorce, the same as if the husband were dead. This is a right in the property of the husband, and the authorities cited by us show that this one-third interest passes by operation of law, and that in the language of Mr. Bishop, it would be a "jurisdictional impertinence" for the court to make any mention of it in its decree.

We claim that whatever must flow by operation of law from a decree of court, is necessarily within the jurisdiction of that court in the proceedings leading up to that decree. Jurisdiction is conferred upon courts by the constitution and laws of the country in which they are. The fact that the statutes of California do not authorize a court in a divorce proceeding to award the separate property of the wife, does not, of course, prohibit the laws of Hawaii from conferring that power upon their courts. All divorce jurisdiction is peculiarly a matter pertaining to the domicile of the parties. When the statute of that country, therefore, conferred upon its court the power to hear and determine an action for divorce, and said further that the legal consequences of a certain judgment of divorce shall be that the property rights of the wife are divested, it conferred upon the court the power to hear and determine those property rights by virtue of its adjudication as to the status. The fact that no *lis pendens*, attachment, or other process of sequestration was issued cuts
no figure, because such proceeding is important only as regards
157 third parties. It could not add anything to the jurisdiction of the courts, and since it is not claimed that respondent sold or assigned the policy *pendente lite*, such process would have been useless.

We deem it, therefore, unnecessary to refer at length to the argument of counsel as to when and how this change of domicile took place. As it seems to us, all the assignments of error on account of the objections to the testimony of the respondent should have been sustained. Suffice it to briefly refer to his argument *seriatim:*

First. This is not an effort to execute or enforce this Hawaiian law in the courts of this country, because it has already been executed there. All the cases cited by respondent show an effort to enforce *de novo* the statute of one State without having first reduced it to a judgment in its own jurisdiction, as if no suit for divorce had been brought in Hawaii, but the parties had begun such an action in California and attempted to compel the California court to enforce the foreign statute in such an action. This, of course, could not be done. This statute is not contrary to the policy of the State of California or its laws. It, of course, differs from our laws, but that does not mean that it is opposed to its policy. "The settlement of property rights between the parties is an incident of every decree for divorce where there is any property involved."

Mott *v. Id.*, 82 Cal. 413;
Gaston *v. Id.*, 114 Cal. 542.

158 The method by which this property shall be assigned, and in what proportions, varies in every jurisdiction.

In our opening, we showed that in six States of the Union this identical statute is in force. In our own State, upon a divorce being granted for the adultery of one of the parties, the court may award all the community property to the innocent party

Civil Code, sec. 146.
Eidemuller *v. Id.*, 37 Cal. 364.
Gaston *v. Id.*, 114 Cal. 542.

This disposition of property, from the standpoint of natural justice, must frequently be more harsh and arbitrary than is the Hawaiian statute.

Nor is it an argument against this statute to say that it provides for a forfeiture. The fact that our law disfavors forfeiture, does not mean in an international sense. This is but a rule of construction, to be applied when the law is couched in ambiguous terms. But if there is no such ambiguity, the rule has no application. There are upon our own statute books many laws imposing forfeitures. (Oakland R. R. Co. *v.* R. R. Co., 45 Cal. 365.) The policy of California is, therefore, not opposed to them.

Second. Nor is this Hawaiian statute a penal statute, in an international sense. The definition of a penal statute, in this connection, has been settled in this country by the leading case of Huntington *v.* Attrill, 146 U. S. 657.

159 It is there held that the word "penal," as used in the expression, "the courts of one country will not enforce the penal laws of another," means a statute which has for its purpose the punishment of an offense against the public justice of the State, and not to afford a private remedy to a person injured by the wrongful act.

This decision is furthermore pertinent to the case at bar, in that one of the grounds upon which it was claimed that the statute thereon sued on was penal, was that the local court, in Huntington *v.* Attrill, 118 N. Y. 365, had decided that this was a penal statute; but the Supreme Court of the United States say (page 679):

"Nor can those decisions, in any view, be regarded as concluding the courts of Maryland, or this court, upon the question of whether this statute is a penal law, in the international sense."

This is a question not of local, but of general law, or, as said by the court (page 683):

"In this country, the question of international law must be determined, in the first instance, by the court, State or national, in which the suit is brought. If the suit is brought in the circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions."

We submit, that this decision is conclusive upon the contention of counsel, in two respects: that this Hawaiian law is not a penal statute, in the international sense, and the fact that the

160 Hawaiian court so denominated it is not binding upon this court.

At the time the policy in suit was made, executed and delivered

the McGrews unquestionably, and the insurance company at least *pro hac*, were resident and domiciled in Hawaii. The contract was not only executed and delivered, there, but the premiums were paid there, and on its face its obligation was to be performed there. It is then distinctly a Hawaiian contract and under accepted principles of American jurisprudence is to be governed in its enforcement by Hawaiian law. (Equitable Life Assurance Society *v.* Clements, 140 U. S. 226; Liverpool Steamship Co. *v.* Phenix Ins. Co., 129 U. S. 397, 458.)

Immediately upon the issuance of the policy the money to become due under it belonged to the beneficiary, Alphonsine, (Central National Bank *v.* Hume, 128 U. S. 195) subject only to forfeiture at the instance of the company for non-payment of the premiums. It was a valuable asset of her personal estate; it was part and parcel of her personal property. Its subsequent forfeiture to the husband for a violation of the Hawaiian statute policing the status of marriage in that country, judicially found and declared by a competent Hawaiian tribunal, was and is purely a question of Hawaiian domestic law, which both in point of theory and execution is civilized law.

In the suit for divorce by Henri against Alphonsine, the latter was personally served with process, appeared and was de-
161 fended by counsel throughout the continuance of the suit. That she left the islands prior to its conclusion and before entry of the decree, renders that decree none the less effective.

It seems quite unnecessary here to pursue the question raised on behalf of Alphonsine, whether it is the decree of divorce for the special cause, or the statute acting thereupon, that operates to transfer her personal estate to her husband. The truth is, that the decree established with respect to a particular wife the existence of a fact which make applicable to her personally the provision of a statute applicable to all Hawaiian wives, who have so violated their marriage vows. By the law of the land, the guilt of the woman ascertained by a judicial proceeding and eventuating in a decree of divorce on such ground causes the transfer of her personal property just as under the same law the same guilt so ascertained and declared, causes an annulment of the woman's status of wife. The so-called penalty of transfer is part and parcel of the penalty of annulment to which it is incident. Nor does the transfer depend upon the mere wording of the decree, although it does upon its existence, for an express exception of the transfer embodied in the decree in any particular case would clearly be invalid. Generally speaking, upon the entry of the decree the transfer occurs *ipso facto*; the right of the wife to enforce pre-existing contracts for personal property ceases—and as between herself and other inhabitants of Hawaii the contractual bond in such cases, is
162 severed. If then she could not in Hawaii enforce a Hawaiian contract to which she was a party, how shall she be permitted to enforce such contract elsewhere, for a contract invalid by the law of the place where made is invalid everywhere, and this does not infringe that other principle of law that foreign nations will not lend

themselves to the enforcement of penalties—for the case here presented is one where the penalty had already been enacted and enforced by the Hawaiian statute which operated upon the decree of divorce. The question really suggested by this record is not whether a foreign court will lend itself to the enforcement of a foreign penal statute, but whether when a penalty has been exacted by a foreign statute, a court of another sovereignty will interfere to restore it to the culprit, *i. e.*, when personal property has been transferred by operation of the Hawaiian statute from the divorced wife to the wronged husband, both citizens of Hawaii, will a court of California take it upon itself to restore it to the woman?

In attempting to recover this chose in action from the insurance company, the plaintiff is met at the threshold by a defect of title to sue. This defect in title is a thing existing, it is not executory.

Third. Whether this policy belongs to the respondent or to the insured's estate is *res adjudicata*.

It was a part of the issues in the divorce proceedings and was determined by the decree of the Hawaiian court by virtue of which, and simultaneously with which, the personal property of the
163 respondent passed to the insured, under the laws of the country in which the decree was rendered and to which she voluntarily submitted.

The Hawaiian court had full jurisdiction of the person of Mrs. McGrew, and jurisdiction of her property to the extent that the questions connected with the same were incidental by the Hawaiian statute to the divorce suit. The domicile of Mrs. McGrew was in Hawaii. The court having once obtained jurisdiction, Mrs. McGrew could not divest that jurisdiction by leaving the State, and her domicile at the commencement of the suit being Hawaii fixed for all the purposes of the action the situs of her personal property there. She could not change the situs of the personal property by herself removing from the jurisdiction. Even if we concede that she might change her domicile, she could not change her domicile so as to affect the pending proceedings.

If the decree had been the decree of a court of California and its scope and effect had been determined by statute such as the Hawaiian statute, this action would have been defeated by a mere production of the decree at the trial. So a complete defense was established upon proof of the Hawaiian decree of divorce, and of the statute which gave character, scope and effect to it. "The judgment of a foreign court duly proven is conclusive upon the parties when there has been a trial on the merits, and no fraud, mistake or want of jurisdiction is shown." (Lazier *v.* Westcott, 26
164 N. Y. 146; see also Dore *v.* Thornburgh, 90 Cal. 64.)

"The provision of the existing statutes (of Massachusetts) affirming the validity of foreign divorces made no change in the law; but in the words of the commissioners upon whose advice it was enacted, is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be." (Ross *v.* Ross, 129 Mass. 243, 248.)

The necessity of alleging and proving, in this case, the statute which enlarged the scope of the Hawaiian decree so as to include the property rights of the respondent, arose from the fact that otherwise the court could not have treated it as having a broader effect than its own decree in a similar action; and the appellant would have been deprived of his rights under the foreign statute, for in the absence of evidence to prove the law of another State it will be presumed to be the same as that of the forum. (Marstens *v.* Lash, 61 Cal. 622.)

The respondent's property rights, including her right to the policy, composed part of the subject-matter of the divorce action. The statute of Hawaii made her continued ownership of this policy, as part of her personal estate, depend upon the result of the action, upon her success in establishing that she was innocent of the charges of adultery of which *prima facie* she was proved guilty.

We repeat, her property rights composed part of the subject-
165 matter of the action. The subject-matter of an action is defined as "the cause; the object; the thing in dispute." (Bouvier Law Dict.) "The matter or thought presented for consideration in some statement or discussion." (Webster Dict.) In an action for divorce "jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action." (Hunt *v.* Hunt, 72 N. Y. 217).

The general subject involved in the action in which a decree of divorce was rendered against the respondent was the marital status of the parties and all things incident thereto including property rights. Forfeiture to the aggrieved spouse of the property of the delinquent, either in whole or in part, has always been recognized as a necessary concomitant of the decree. A decree against the wife extinguishes her dower right; against the husband, his rights as tenant by the curtesy. But, it is argued, these particular rights accrue upon the marriage, and it is only logical that they should become extinct upon the annul*l*ment of the marriage. This argument is based upon a false premise, upon the assumption that the rights of dower and courtesy are other than creatures of the law; liable to extinguishment by act of the legislature at any time, as the law which gave to the husband all of his wife's personal estate and the rents of her real estate was repealed long ago. Indeed, the statute of Hawaii, in making the decree operative as a transfer of the unfaithful wife's personal estate, secures to the husband, by way
of compensation for her perfidy; that which would
166 have been his as of course under the common law. In New York, the court of appeals has held that the wife's dower right in real estate is not cut off by a divorce dissolving the marriage contract on the ground of adultery of the husband. "A divorce at common law avoided the marriage *ab initio*," said the court. "It was equivalent to a sentence of nullity under our statute. It placed the parties in the same relation to each other as though there had been no marriage. The issue of the marriage were bastardized. * * * Until our statute, there was no such thing as divorce which recognized and admitted the validity of the marriage, and

avoided it for causes happening afterwards. Such a divorce is alone the creature of the statute. The principles applicable to a common-law divorce cannot be made applicable to a divorce which admits the validity of the marriage and the rights and obligations resulting from it. The effect of such a divorce must be determined entirely by the provisions of the law under whose authority it is granted. The common-law divorce avoided the marriage and all rights and obligations resulting from it. The statutory divorce is limited in its operation and only affects the rights and obligations of the parties to the extent declared by the statute. The marriage being valid, the rights it conferred, and the obligations it imposed, continue, where the legislature has failed to interfere."

Wait *v.* Wait, 4 N. Y. 95, 100.

167 The soundness of these views is recognized by the United States Supreme Court in Barrett *v.* Failing (111 U. S. 523) in which the New York case is cited and approved, and which contains the following language applicable to the present contention:

"It is not doubted that the decree of divorce from the bond of matrimony, obtained by the plaintiff in California in a court having jurisdiction to grant it and after the husband had appeared and made defense, bound both parties and determined their status. The question considered by the court below and argued in this court is whether by virtue of that decree, and under the law of Oregon the wife is entitled to one-third of the husband's land in Oregon. Unless otherwise provided by local law, a decree of divorce by a court having jurisdiction of the cause and of the parties dissolving the bond of matrimony, puts an end to all obligations of either party to the other, and to any right which either has acquired by the marriage in the other's property, except so far as the court granting the divorce in the exercise of an authority vested in it by the legislature orders property to be transferred or alimony to be paid by one party to the other." The learned court points out that the order "does not of itself transfer any title in real estate, unless allowed that effect by the law of the place in which the real estate is situated," thus upon the principle *expressio unius exclusio alterius*, impliedly hold-

168 ing that the order would have the effect to transfer the personal estate of the offender situated in another State, and if there was nothing prohibitive in the law of that other State, the real estate situated there, also.

In Ross *v.* Ross (129 Mass., at page 248) it is said:

"As to foreign divorces it is well settled in this Commonwealth, that a decree of divorce rendered in another State, in which the legal domicile of the parties is at the time, and according to its laws, even for a cause which is not a ground for a divorce by our laws * * * is valid here and conclusive in a suit concerning a husband's interest or wife's dower in lands in this Commonwealth," a principle, as intimated by the learned court, founded upon the comity of all civilized nations.

If a foreign decree puts an end to existing rights of property belonging to the guilty party (as in Barber *v.* Root (10 Mass. 260) in

which a decree against a husband rendered in Vermont was held to determine his rights to the rents of his wife's real estate in Massachusetts) surely its effect can be broadened even to the creation of new rights in favor of the innocent. In applying the rule founded upon the comity of nations, courts do not discriminate as to laws. Whether it annexes one incident to a decree of divorce or another, whether it gives to the innocent husband all he would have been entitled to of his wife's property in case she were actually deceased, or merely lops off the incubus of an abandoned woman, dead to him alone, and sets him free; in either case, the law will be re-
169 spected and enforced in its most far-reaching effect. He is entitled to assert the property rights passing to him under the decree, in the courts of all nations amenable to the principle of comity. Did this policy pass to the intestate according to the law of Hawaii? If so, upon what principle shall it be said that within this State it still remains the property of the respondent?

Referring to the binding effect upon a wife's property in the District of Columbia, of a decree of divorce rendered against her in Indiana, said Mr. Justice Swayne, expressing the unanimous opinion of the United States Supreme Court: "The decree rendered in Indiana, so far as it related to the real property in question, could have no extraterritorial effect; but, if valid, it bound personally those who were parties in the case, and could have been enforced in *situs rei*, by the proper proceedings conducted there for that purpose." So, if the intestate in this case had come into this State and had instituted proceedings to recover the policy, supposing it to have been in his wife's possession, he would have recovered upon proof of the decree and the statutory effect of it.

W. E. B.
Cheever *v.* Wilson,
9 Wall., p. 121.

Again, if it were necessary to secure to the appellant the benefits of the Hawaiian decree, this court would have the power to compel the respondent to execute a transfer of the policy to the appellant. In a case decided as recently as January, 1897, by the supreme court of Massachusetts, the defendant had executed to his wife in North Carolina, where both were domiciled, a covenant to surren-
170 der to her all his marital rights to certain lands belonging to her situated in Massachusetts, in consideration that she should forbear suing for divorce. A bill to enforce the covenant in the State of Massachusetts was demurred to on the ground that the contract executed in North Carolina was not binding as to lands in Massachusetts. In overruling the demurrer and holding that the plaintiff, the wife's administrator, was entitled to an injunction restraining the defendant from asserting as against the plaintiff any title to the real estate in question, and to an order directing a conveyance to the plaintiff of all the defendant's right, title and interest therein, said the court:

"It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the *res*. But the same reason inverted establishes that the *lex rei sitæ* cannot

control personal covenants, not purporting to be conveyances between persons outside the jurisdiction, although concerning a new thing within it. Whatever the covenant, the law of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment for a failure to perform it. Therefore on principle the law of North Carolina determines the validity of the contract," citing numerous authorities (Polson *v.* Stewart, 167 Mass., 211, 214).

Further, the Hawaiian courts, having jurisdiction of the person of the respondent, could have compelled her to execute such a transfer, assuming the situs of the policy was in this State, following
171 the respondent's domicil, for "it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary according to the *lex loci rei sitæ* which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*," (Phelps *v.* McDonald, 99 U. S. 298, 308).

Upon the question of jurisdiction an action to compel a transfer would be regarded as merely ancillary to the divorce action, and the Hawaiian court which rendered the decree in the original, might grant the relief sought in the ancillary action without regard to the present citizenship of the respondent. (Pacific R. R. of Mo. *v.* Missouri P. R'y 112 U. S. 505, 522.) The principle indicated is a familiar one, and has been applied in a variety of ways. In Banks *v.* Calhoun (102 U. S. 256) a Federal court had taken possession of the mortgaged railroad in a foreclosure suit. It was held that having thus taken possession of the subject-matter of the litigation, the Federal court had acquired the right to decide upon all conflicting claims to the possession and control of the road, and that an attachment suit which had been begun in a State court could be properly removed by stipulation to the Federal court, because "the
172 parties did no more than what they could have been compelled to do by the injunction of the Federal court, and what would have been done by such compulsory order, if they had not submitted to it by agreement."

We have shown upon authority (Polson *v.* Stewart, *supra*) that the interstate, through the courts of this State of California, could have compelled an actual transfer of this policy, if necessary to carry into effect the foreign decree.

Now, we contend that what the interstate might have done by prosecuting an action, this appellant is now doing by defending an action, namely, asserting the right to the policy to which it has been subrogated, upon the ground that it passed to the interstate under the decree of divorce, by which the respondent is bound and by which she is estopped.

It is not to be lost sight of that no rights of innocent third parties are involved herein. Indeed at any time pending the divorce pro-

ceedings, the intestate would have been entitled to an injunction restraining any disposition of the policy to his prejudice, as by disposing of it to an innocent third person for value, upon the ground that the policy was a part of the subject-matter of the suit, and such a disposition of it would *render* the decree against the respondent ineffectual in the language of the code. (Cole *v.* Cunningham, 133 U. S. 107, 117.)

We deny that there is any merit in the respondent's contention that the Hawaiian statute is against the public policy of this
173 State. To what extent the property of the delinquent shall be appropriated in divorce suits, and handed over to the innocent injured party, is peculiarly a matter to be determined by the legislature of the State or country to the restraint and control of whose laws the parties have submitted their persons and property. The views of the various State legislatures upon the question of property rights of divorced persons are diverse indeed, but they are respected and enforced in all courts. Why then should the laws of a foreign country, which, to say the least, are not more oppressive upon the offender than some of our own State laws, be not regarded with equal respect.

Fourth. If public policy could be successfully invoked under the circumstances of this action, it would not be long before the principle of international comity would become a thing of comparatively little importance indeed.

But we contend that respect for the Hawaiian decree is secured by treaty stipulations, which sometimes smooth the way for the recognition, in doubtful cases, of the effect of foreign judgments upon property rights and interests. By treaty concluded between this country and Hawaii in 1849, it was provided that "if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are" (Treaties and conventions concluded between the United States and other powers (1889) p. 550).

174 We call special attention to the words, "if a question should arise," in this provision of the treaty. The provision is to be construed to mean that the laws and judges of the land wherein the said goods are when the question shall arise, shall decide the ownership.

In this case there can be no doubt as to where the "goods" were when the question arose, within the meaning of the treaty. question arose when the divorce action was commenced; for the ownership of the policy (which, by intendment, is to be included in the word "goods") was, by express statute, made to depend upon the result of that action; in other words, it was involved in it as completely as was the question of divorce. It is not at all material where the policy was at the beginning of this present action, but when it was when the respondent, by appearing in the divorce proceedings, submitted to the jurisdiction of the Hawaiian court. To hold otherwise would be to disregard this treaty.

"With us a treaty is a part of the supreme law of the land; as

such, it influences and controls the decisions of tribunals * * * Nations are bound to maintain respectable tribunals, to which the subjects of States at peace may have recourse for the redress of injuries, and the maintainance of their rights. If the character of these tribunals be respectable, impartial and independent, their decisions are to be regarded as conclusive."

This is the language of Daniel Webster, when, as Secre-
175 tary of State, he was called upon to discuss the treaty between this country and Spain in 1842 (2 Wharton on International Law, 2nd ed. pp. 29–30) treaties adopted by the executive department should be followed when not repugnant to the language or purpose of the treaty" (Castro *v.* De Uriarte, 16 Fed. Rep. 93).

"It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity" (Hauenstein *v.* Lynham, 100 U. S. 483, 490; Shanks *v.* Dupont, 3 Pet. 242; Foster *v.* Neilson, 2 Pet. 253; The Cherokee Tobacco, 11 Wall. 116.)

Claiming under this treaty, as being a part of the supreme law of the State of California, the appellant submits that its terms should be liberally construed. If the word "goods," used in the treaty can be construed so as to include a policy of insurance, it should receive that construction. "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred." (Hauenstein *v.* Lynham 100 U. S. 483, 487).

The appellant's right to invoke this treaty is undoubted, for, as a well-known writer has said, international treaties "apply to the judgments of the courts, irrespective of who it is that pleads them" (Bars International Law, 2nd ed., p. 983), and, as appears from the cases cited, they are part of the supreme law of the contracting parties.

176 Counsel has cited the case of Barrett *v.* Failing, 6 Sawyer, 473, as authority for the proposition that a statute of Oregon, providing for a transfer of real estate upon the rendition of a decree of divorce, could have no extraterritorial effect. This decision, as well as that rendered by the Supreme Court of the United States in affirming the judgment (111 U. S. 523), is very pertinent to the case at bar, in that it holds that where the statute is mandatory, no allegation nor proof concerning the property rights is necessary, and it further concedes (6 Sawyer, 479) "that the legislature has the power to provide that a decree of divorce pronounced in the courts of another State shall have the same effect upon the real property of the parties in this State, as if given here." But, on the point cited by counsel, this decision does not sustain him. The court had to decide whether a divorce rendered in California passed title to real estate in Oregon, under a statute of the latter State. And the decision is, that the legislative intent evidently was, that the statute should apply only to a divorce rendered in the Oregon courts, because it occurs in a code of procedure where any reference to an action must refer to an action under that code. This decision is

clearly right. We do not claim that this Hawaiian statute would apply, if the divorce was decreed in any other country, even to personal property in Hawaii. It is not necessary to consider that question, because the divorce was rendered in the same country
177 that enacted the law. If we will suppose an action for divorce to have been brought in Oregon, and a decree obtained there, and afterwards an action to be brought in California by the same parties, for the rental of the lands transferred by virtue of the divorce decree, then the cases would be analogous.

Fourth. The ruling of the court in refusing to recognize as binding or controlling upon it, the fact that the policy had been already paid to an administrator appointed by the Hawaiian court was erroneous beyond the shadow of a doubt, if the case of New England Mutual Life Insurance Company *v.* Woodworth (111 U. S. 138) is to be accepted as a precedent. In that case the rule is stated that:

"A policy of life insurance, issued by a company incorporated in one State, payable to the assured, his executors or administrators, is assets for the purpose of founding administration upon his estate in another State, in which the corporation, at and since the time of his death, does business, and, as required by the statutes of that State, has an agent on whom process against it may be served."

In arriving at this conclusion said the court:

"The general rule is that simple contract debts, such as a policy of insurance not under seal, are for the purpose of founding administration assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in Wyman *v.* Halstead, 109 U. S. 654. But the reason why the State which charters a corporation is its domicil in reference to debts which it owes, is because there only can it be sued or
178 found for the service of process. This is now changed in cases like the present; and in the courts of the United States it is held that a corporation of one State doing business in another, is suable in the courts of the United States established in the latter State, if the laws of that State so provide, and in the manner provided by those laws."

The propriety of this decision has been recognized repeatedly and in no case has it been questioned. Of course, if this court refuses to be bound by the Hawaiian decree of divorce, and its effect upon the respondent's property rights, the case does not apply, otherwise it is entirely applicable.

The case is applicable, also, in construing the words of the treaty above discussed, viz., "where the said goods are," "when the cause of action arises," for the appellant carried on business in Hawaii, at the death of the insured, in conformity to the requirements of the Hawaiian statute, enabling resident creditors to bring suits there against corporation created by foreign laws and was, therefore, to be regarded as domiciled within Hawaii. Therefore, whether the cause of action is to be considered as having arisen when the decree of divorce was rendered, or when the action by the Hawaiian administrator to recover upon the policy was brought, in either case the "goods" were in Hawaii.

Under the laws of Connecticut, this policy would have been forfeited to the insured, for, under those laws, property, real or personal, received from the husband in consideration of mar-
179 riage, or love, or affection is decreed to the husband. In Maine, Vermont, Rhode Island, Nebraska and Arizona, upon divorce for adultery of the wife, the husband holds all the personal estate of the wife, except that the court may in its discretion grant her a subsistence thereout; but more than that, he holds all her real estate for her life, thus equalling the severity of the Hawaiian laws.

Nor can this ruling be sustained upon the ground that the offer was to show that a payment had been made to the administrator of the estate of McGrew, not as the money of the respondent, but as the money of Henri McGrew. The offer (fol. 112) was that the full amount of the policy had been paid to the administrator on account of a full receipt and release of all claims on account of and by reason of the said policy, and also in consideration of the cancellation and redelivery of the policy to the company; thus to show a payment not as a discharge merely of the obligations due to the estate of Henri McGrew, but as a discharge of all obligations on the policy to whomsoever they might have been due.

We submit that in the present aspect of the case, this refusal to permit evidence of the payment and of the cancellation of the policy was reversible error. It was, of course, no longer necessary after this ruling had been made, to show that Henri McGrew was solvent at his death, and that a portion, if not all, of this payment, would go to his heirs.

Respectfully submitted,

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Attorneys for Appellant.

EDWARD LYMAN SHORT, *Of Counsel.*

179½ Due service by copy of the within reply brief is hereby admitted this 20th day of April, 1898.

PLATT & BAYNE,
Attorneys for Respondents.

W. E. B.

180 S. F., No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
MUTUAL INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Reply Brief.

Platt & Bayne, attorneys for respondent.

Filed this 30 day of April, A. D. 1898.

TROWBRIDGE H. WARD, *Clerk.*
By A. W. JOHNSON, *Deputy Clerk.*

W. E. B.

180½ San Francisco, No. —.

In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
MUTUAL INSURANCE COMPANY OF NEW YORK, Appellant.

Respondent's Reply Brief.

Counsel for appellant having submitted in their reply brief some additional authorities, we beg leave to reply to the same.

I.

Appellant says (page 7, Reply Brief): "The policy of
181 California is, therefore, not opposed to them" (meaning forfeitures), and bases this statement upon Oakland R. R. Co. *v.* R. R. Co., 45 Cal. 365. This was a case in which a penalty prescribed by a local statute was enforced. In the case at bar the penalty or forfeiture is one prescribed by a foreign statute. We urged the rule against forfeitures as an additional reason why our court would not enforce this foreign statute. The latest expression of our court upon this subject is in Sav. & Loan Soc. *v.* McKoon, 52 Pac. Rep. 306, wherein this court said, "Penalties are never favored by courts of law or equity, and statutes imposing penalties or creating forfeitures must be strictly construed. Every intendment or presumption is against the person seeking to enforce the penalty or forfeiture provided by such a statute."

II.

In appellant's Reply Brief (page 7) the case of Huntington *v.* Attrill, 145 U. S. 657, is cited, wherein the Supreme Court of the United States held that a statute of a State will not be construed to be a penal law in the international sense so that it cannot be enforced in the courts of another State, unless its purpose is to punish an
182 offense against the public justice of the State, and not to afford a private remedy to a person injured by the wrongful act. Under this decision a proceeding must be one to punish crime and in the name of the people in order to come within the rule as to penal statutes. Our answer to this citation is that this ruling of the Federal Supreme Court is binding upon State courts only when the question at issue is one which may be re-examined by the Supreme Court of the United States on writ of error (Belcher *v.* Chambers, 53 Cala. 643), that the case at bar presents no such question, and that the rule laid down in Huntington *v.* Attrill is not the rule in any State of the Union.

In California our supreme court, in a decision subsequent to Huntington *v.* Attrill (1892) recognizes the rule that the courts of one State will not enforce the penal statute of another State, even though the object of the statute is only to afford a private remedy to a person injured by the wrongful act.

Ferguson *v.* Sherman, 116 Cal. 169.

To the same effect are the decisions in the following States:
Iowa—Arnold *v.* Potter, 22 Iowa, 194;
Kansas—Dale *v.* Atchison, 47 Pac. Rep. 523;
183 Maine—Phillips *v.* Madrid, 83 Me. 205;
Maryland—Attrill *v.* Huntington, 70 Md. 191;
Massachusetts—Halsey *v.* McLean, 94 Mass. 438;
Missouri—Kimball *v.* Davis, 52 Mo. App. 194;
New Jersey—Derrickson *v.* Smith, 27 N. J. L. 166;
New York—Langdon *v.* N. Y. L. S. & W. R. Co., 11 N. Y. Sup. 514;
Rhode Island—O'Reilly *v.* N. Y. etc. R. R., 14 Am. St. Rep. 353;
Tennessee—Woods *v.* Wicks, 7 Lea. 47;
Vermont—Adams *v.* Railroad, 30 Atl. Rep. 687;
Cook on Stock and Stockholders, § 223, p. 293.

III.

Authorities are cited by appellant in its Reply Brief (page 14) to the effect that Mrs. McGrew's "property rights composed part of the subject-matter of the action" for divorce. This we strenuously deny. The only subject-matter of that action was the status of the parties thereto, and the record of that action, as introduced in evidence herein, is conclusive and exclusive proof of this.

IV.

In respondent's points and authorities (page 19) we contended that—

184 "The utmost effect that a divorce in one jurisdiction can have upon property in another is that a valid divorce may be held to terminate certain property rights that are dependent alone upon the continued existence of the marriage state, and this, independent of the situs of the property. Dower is one instance of such property rights. It is a property right arising from marriage and dependent upon the continuance of marriage during the life of the husband. Its assertion depends upon proving such marriage and continuance."

Appellant in its Reply Brief (pages 14 *et seq.*) cites authorities to the effect that dower is in this regard like all other marital property rights, and that a foreign divorce that would affect dower would equally affect all other property of either husband or wife. Wait *v.* Wait, 4 N. Y. 95, 100, is especially cited as in opposition to our views. If counsel had more carefully read Barrett *v.* Failing, Ill. U. S. 23 (Reply Brief page 16), he would have found that dower, unless preserved by the *lex rei sitæ*, is a marital property right arising solely by virtue of the marital relation, and *ex necessitate* terminating with the termination of this marital relation unless preserved by statute. The Federal court in this decision expressly distinguished Wait *v.* Wait as having been decided under a New York statute.

185 Barber *v.* Root, 10 Mass. 260 (Reply Brief p. 17), is a case in which the husband, after a divorce and when he was no longer a husband, endeavored to enforce a property right that de-

pended upon the continuance of the marital status. The quotation from Ross *v.* Ross, 129 Mass. 248 (Reply Brief page 17) is to the same effect. Both of these citations are in accord with the above quotation from respondent's points and authorities.

V.

Appellant (Reply Brief page 18) cites Cheever *v.* Wilson, 9 Wall. 108, as to the binding effects of a foreign divorce upon property situated beyond the jurisdiction of the forum of the divorce. In this case it appears that a divorce was rendered in Indiana, that both parties appeared therein, and that in the decree it was adjudged that the husband should receive one-third of the income of certain of the wife's separate property situate in the District of Columbia, and it was decreed that the wife should execute to him a sufficient power to collect said income. This power she executed. This was a personal judgment against the wife, and, of course, bound her personally wherever she might be. But this case is not applicable to the case at bar, as there is no personal judgment as to property, as there was in Cheever *v.* Wilson.

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Polson *v.* Stewart, 167 Mass. 211 (Reply Brief pages 18, 19), is not in point. This case involved simply the enforcement in one jurisdiction of a personal contract executed in another jurisdiction. None of these cases or of the others cited in appellant's reply brief go to the extent of holding more than that the courts of one jurisdiction may enforce a personal covenant entered into in another jurisdiction or a personal judgment rendered in another forum, the later having acquired jurisdiction over the person against whom judgment was rendered. No case is cited that holds that a foreign statute is necessarily so enforced, or that Mr. McGrew could have compelled in the courts of this country a transfer of this policy simply upon a production of the decree of divorce. And yet in the cases cited in appellant's reply brief the judgment-roll in the foreign judgment sought to be enforced was all that was competent or material in the case.

The Hawaiian court could not in any action subsequent to the divorce or at any time have rendered any judgment against Mrs. McGrew binding upon her in this jurisdiction to compel a transfer by her of this policy, unless they had acquired jurisdiction over her there in that particular action.

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VI.

We cannot see the application of New England Mutual Life Ins. Co. *v.* Woodworth, 111 U. S. 138 (Reply Brief page 26). We have never questioned the jurisdiction of the Hawaiian court to render any judgment against appellant, if any such was rendered. We simply maintain that such a judgment is *res inter alios acta* as to Mrs. McGrew, and that the offer to prove it as showing a discharge of all obligations under the policy as against every one could not have this effect as to those not parties to that action. Furthermore, there is no proof that the appellant carried on business in Hawaii at the death of the insured or had any agent there on whom process

could be served. Therefore, not only is the last citation not applicable, but the argument on page 27 of this reply brief as to the effect of the treaty is for the same reason not in point.

VII.

The citation on pages 27 and 28 of the reply brief as to the laws of other States is too general to notice. Suffice it to say that
188 the law of California is opposed in letter and principle to the Hawaiian statute sought to be enforced.

VIII.

Appellant's contention is that respondent's title to this policy was divested by the decree of divorce, that this divestiture was an essential incident of the divorce, though not mentioned in the judgment or decree, and that, therefore, as respondent submitted herself to the jurisdiction of the Hawaiian court in the action for divorce, the courts of this country will enforce that decree in every particular and incident.

Respondent's contention is that respondent's title to this policy was not divested by the decree of divorce, that it was only by the statute that any divestiture was attempted, that the courts of this country will not enforce this statute, and that as the right to this policy was not acquired as an essential incident of the marital relation, the divestiture thereof was not necessarily an incident of the divorce, but simply a statutory penalty that was apart from but conditioned upon the divorce. If the title to this policy was transferred to Dr. McGrew, it was transferred solely under the Hawaiian statute, and this we have shown was not possible. A transfer
189 of title by operation of law can only be effected within the limits of the territory where the law prevails; and, as the laws of a State have no extraterritorial force, it follows that the title to property located in one State cannot be passed by force of the laws of another. In such cases the law operates, if at all, on the property, and if the property is without the territorial limits of the State whose legislature enacted the law, it is plain that the law can have no effect upon it except by virtue of comity, and no State is bound to give effect to the law of a foreign State to the prejudice of the rights of its citizens.

Receiver &c. *v.* First Nat. Bank, 34 N. J. L., 454.

Respectfully submitted,

PLATT & BAYNE,
Attorneys for Respondent.

189½ Service of the within reply brief accepted this 28th day of April A. D. 1898.

CHICKERING, THOMAS & GREGORY,
Attorney- for Appellant.

W. E. B.

190 Filed Feb. 28, 1901. Geo. W. Root, Clerk, by R. E. Homlein, Deputy. In Bank.

ALPHONSINE McGREW, Plaintiff and Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF New York, Defendant and Appellant.
S. F., No. 1230.

Action on a life-insurance policy. Judgment was for plaintiff in the court below and from the judgment defendant appealed.

The respondent is a resident of California where this action was commenced, and the appellant is a resident of the State of New York.

The defense is rather a remarkable one; it rests upon a decree of divorce rendered by a court of the Republic of Hawaii, in an action brought there against the present respondent by the guardian of her husband—a decree which could not have been obtained here; and upon an Hawaiian statute which has no force here except by comity.

The material facts in the case are these: On September 14, 1892, the respondent was the wife of one Henri G. McGrew and she and her husband were then residing and domiciled in Honolulu, Hawaiian islands. On that day the policy of insurance sued on was executed, by which defendant promised to pay five thousand dollars to the respondant herein, Alphonsine McGrew, upon
191 the death of the husband, Henri, provided she should be living at the time of such death. Henri died on the 22nd day of October, 1894, leaving the respondent, his wife, surviving him.

In 1893 Henri and respondent made a trip to California for the benefit of the health of the former; and in the latter part of December, 1893 they returned to Honolulu, he being then in a very feeble mental condition from softening of the brain. When they landed at Honolulu they were met by one Carter who assumed control over them and ordered them not to go to the home in which they had been living, but to go to an hotel. It appears that soon afterwards Carter was the legally appointed guardian of the person and estate of Henri, who had been then judicially declared to be *non compos mentis;* but it does not appear when, he became such guardian. A few days after respondent and her husband went to the hotel Henri was removed by Carter from the hotel to a hospital. Respondent wanted to go back to the home where they had formerly lived, but Carpenter, who had the key and control of the house, would not let her, and he sold all the furniture in it except a piano which plaintiff claimed as her own. Carter would not furnish her a home or any money, and Henri was an imbecile incapable of understanding the situation.

On February 8, 1894, Carter as guardian of Henri brought an action on behalf of the latter to obtain a divorce from respondent, alleging adultery as the ground of the divorce. Service of process was served on respondent in Honolulu, and she appeared in the ac-

tion by an attorney and filed a demurrer, and afterwards an answer denying the charge.

192 On April 5, 1894, respondent left the Hawaiian islands with the intention of not returning there again, but intending to come to California and make her home there. She obtained the funds to pay the expenses of the journey by the sale of her piano. She said that she came to California to make a home here, and also through fear that "they" would take her infant child away from her. She arrived here in the same month—April, 1894—and has since then constantly resided in California intending it as her place of residence.

On August 25, 1894, the Hawaiian court entered a decree of divorce in the said action brought by Carpenter dissolving the bonds of matrimony between this respondent and the said Henri, (and it is not improper to say that the evidence in the case was conflicting). There was nothing in the pleadings in said case about property, and the decree was simply one of divorce without any disposition of any other matter whatever. But there is, and at that time was, a statute of Hawaii which declared that "when a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

Respondent contends that the judgment in the divorce suit should be held invalid because, in the absence of an express statute on the subject, an action for a divorce cannot be maintained by a guardian, and there is no such statute in Hawaii—the only one relied on being the general provision that the guardian of an insane person "shall appear for and represent his ward in all legal suits and pro-

193 ceedings, unless where another person is appointed for that purpose;" but admitting these legal propositions to be correct, the courts of Hawaii have held otherwise, and their construction of the statutes of their own country cannot be here assailed. (McGrew *v.* McGrew, 9 Hawaiian Reps. 475.) Full effect must therefore be given to the judgment in the divorce suit.

It is also contended by respondent that the judgment in the divorce suit was never absolute and final, because certain exceptions taken by the defendant's attorney therein have never been disposed of, and it is provided by the Hawaiian statutes that "no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of." The transcript contains many things about the law of Hawaii touching the taking of exceptions in a trial court and having them certified up to the appellate court, which are somewhat difficult to understand; but as the supreme court of that country seems to have held that the judgment in McGrew *v.* McGrew had become absolute (10 Hawaiian Reps. 117), and as there is no express finding on the subject in the case at bar, we are compelled to hold that the said judgment was final and conclusive as to the matter therein adjudicated.

Under our views of the case it is not necessary to determine the points made by respondent, that the Hawaiian statute has no force here on the ground of comity, because it is penal, works a forfeiture, and is contrary to the public policy of this State, &c.

As the plaintiff herein was served in Hawaii with process in the
divorce suit and appeared therein by attorney, the court
194 had jurisdiction and the judgment therein rendered concludes
here as to the one thing adjudicated therein. But the judgment
is merely a decree of divorce; it does not deal with any property
rights; and if, as claimed by appellant, all the personal property of
respondent, including the policy sued on, passed to her husband,
that result must have flowed from the said Hawaiian statute pro-
viding for the forfeiture of the wife's property, and not from any-
thing decreed in the judgment. It was not a case where the ad-
judication by final judgment of property rights asserted in the
pleadings relates back to the commencement of the action; for in
that case there were no property rights averred, or considered, or
adjudicated. The respondent's right to her property was not af-
fected by the mere pendency of the suit for divorce; and the statute
had no applicability until the entry of the judgment. The question,
therefore is, what was the right of respondent to the property in-
volved at the time when the said statute could be invoked? And
it is clear that if at that time she was domiciled in California the
Hawaiian statute had no operation upon her or her personal prop-
erty here; for the law which governs personal property is the law
of the domicile. (See Whitney *v.* Dodge, 105 Cal., 192, and
authorities there cited.)

In our opinion the respondent at the time when the Hawaiian statute took effect was domiciled in California. This is clearly so unless we must ignore her actual residence on account of the maxim (or "fiction" as it is sometimes called) that the domicile of the hus-
band is the domicile of the wife. We think that the reason of
195 the rule and of course the rule itself, ceases when the husband
discards his wife by instituting proceedings for the dissolu-
tion of the bonds of matrimony. The theoretical unity of husband
and wife dissolves in the presence of a legal proceeding, the direct
and only purpose of which is to destroy that unity. This is ad-
mitted to be so where the wife brings the suit for divorce; but the
reason of the rule applies to her whether she be plaintiff or defend-
ant; her interests and rights as defendant are frequently more
serious than any she could have as plaintiff. It is not the law that
a husband who is a plaintiff in a divorce suit can—as in the case at
bar—actually put his wife out of his home and at the same time
successfully claim that by operation of law she is still in it. We
think that the correct principle is stated in the decisions hereinafter
noticed. In some of them it was held that the divorce itself was
invalid outside of the State in which it was granted, because founded
upon the theory that the domicile of the husband was the domicile
of the wife, contrary to the actual fact; but the principle applies
much more strongly to the case at bar where the question is not as
to the validity of the divorce, but as to the operation of a foreign
statute upon her and her personal property at a time when she and
the property were in this State.

In Irby *v.* Wilson, 1 Dev. & B. Eq. (N. C.) 568, the parties had married in South Carolina where they were then domiciled, had

afterwards removed to and established a residence in Tennessee and then, after a separation, the wife had gone to North Carolina
196 and permanently resided in the latter State; and afterwards the husband had obtained a decree of divorce in Tennessee.

The opinion of the court contains interesting discussions of the doctrine of the extraterritorial force of laws and judgments; but the decision turned on the single point, that the domicile of the wife at the time of the divorce was in North Carolina and not in Tennessee where the domicile of the husband was. The court, among other things, say:

"The aphorism that the husband and wife are but one person has been alluded to as founding the argument that his domicile is necessarily hers, * * * but it is a mere fiction which is never allowed even in the common law to obscure much less defeat justice. They are two persons to make a marriage contract. They must also, necessarily, be two persons to litigate between themselves upon any subject, and above all upon the obligation, continuance, or dissolution of that contract. They are not therefore so identified that they cannot have opposing interests, that they cannot have separate existences and separate residences and homes. If the argument of the counsel were well founded it would prove that the husband might sue his wife for a divorce, enter her appearance, and in her name confess his own allegation."

In Mellen *v.* Mellen, 10 Abbot's New Cas. 329, the court declared the law—we quote for brevity from the syllabus—as follows:

"Although, *prima facie*, the domicile of the wife is the same as that of her husband, the law recognizes an exception to the rule when the husband begins an action to dissolve the marriage contract. In such case, the theoretical identity of person and interest ceases to exist, the legal fiction of one domicile no longer operates, and the jurisdiction of the court to entertain the action depends upon the actual existing facts."

In Colvin *v.* Reed, 55 Pa. St. Reps. 375, the question involved was that of the domicile of parties to a divorce suit; and the court said:

197 "But the unity of person created by the marriage is a legal fiction, to be followed for all useful and just purposes, and not to be used to destroy the rights of either, contrary to the principles of natural justice, in proceedings which from their nature make them opposite parties. It required their mutual consent to establish the relation from which the unity arises; and the same law of right demands them to be viewed in their separate natural condition when either proceeds against the other to destroy this relation. It is the necessary effect of their being opposite parties in the same proceeding."

(See also Derby *v.* Derby, 14 Ill. Ap. 647.)
(Hews *v.* Hews, 16 N. Y. Sup. 119.)

The principle declared in the above cases is recognized and restated in section 129 of the Civil Code of this State as follows:

"In actions for divorce the presumption of law, that the domicile

of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions."

There is no reason for limiting this broad provision to cases where the wife is plaintiff.

In the case of Wickes' Estate, 16 Pac. Rep. 865, cited by appellant, there was no question as to the law of domicile as between husband and wife when they are hostile parties to a suit for divorce. There had been no divorce nor action for divorce in that case; and no question touching any phase of the subject of divorce was before the court. There a married woman had been living at the time of her death in a county different from the one in which her husband was living and in which she formerly lived with him; and it was merely held that under those circumstances the jurisdiction of the administration of her estate was in the county where her husband resided.

Our conclusion is that at the date of the decree of divorce
198 the respondent was domiciled in California, and had been since she came here in April, 1894; and that therefore the Hawaiian statute under which the forfeiture of her personal property is claimed had no effect upon her or her property in California.

It is not necessary therefore to consider the point made by respondent, that even if her domicile continued to be that of her husband until the date of the decree, yet upon the entry of the decree her actual residence instantly became her legal residence, and that if the decree, the legal change of residence, and the taking effect of the statute were simultaneous, the court under the rule that a forfeiture will always be defeated if possible, will give precedence to the change of domicile.

The court did not err in excluding evidence of the fact that appellant had satisfied a judgment recovered against it by the administrator of Henri G. McGrew on the policy here sued on, in an action to which the respondent here was not a party. The fact that appellant paid the policy to the wrong party would be no defense to an action brought by the right party.

Under the views which we have taken of the case, the other exceptions argued by appellant are of no importance.

The judgment appealed from is affirmed.

McFARLAND, *J.*

We concur:

GARROUTTE, *J.*
VAN DYKE, *J.*
HENSHAW, *J.*
HARRISON, *J.*

[Endorsed:] Decision in Cal. supreme court.

198½ [Endorsed:] S. F. No. 1230. In the supreme court of the State of California. Alphonsine McGrew respondent *vs.* Mutual Life Insurance Co. of New York. appellant. Opinion of the supreme court of the State of California. Chickering & Gregory attorneys-at-law 222 Sansome street San Francisco, Cal.

199 S. F., No. 1230.

In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Petition for Rehearing.

Chickering & Gregory, attorneys for appellant.

Filed this 20 day of March, A. D. 1901.
GEORGE W. ROOT, *Clerk*,
By GEO. H. RYAN,
Deputy Clerk.

W. E. B.

Affirmed. McFarland, J.
Bank briefs.
For opinion see No. 1158, p. 315, Cal. Decisions.
Due Mar. 30, 1901.

199½ In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Petition for Rehearing.

The appellant respectfully requests a rehearing of the above-entitled cause.

The reply brief of appellant was filed in April, 1898, and therefore nearly three years elapsed from that time to the rendition of the opinion. No oral argument has been had, and the novel and interesting questions involved have been decided upon the briefs which necessarily omitted late authorities pertinent to the question.

The judgment in this case is one of peculiar and unusual hardship upon the defendant company.

200 Upon the death of the insured, in October, 1894, the company found itself confronted with two hostile claimants, one in Hawaii, the other in California. It desired to pay the loss to the party rightly entitled, and made no contest on the merits. The administrator of the estate of the insured first commenced his action in Honolulu, and the company raised the point that Mrs. McGrew was a necessary party thereto, thus hoping to bring the two claimants within the one jurisdiction. She was held not to be a necessary party by the supreme court of Hawaii, in Carter *v.* Mutual Life, 10 Hawaiian Reps. p. 19.

Nor was interpleader possible because Alphonsine McGrew was without the jurisdiction of the Hawaiian court, and by publication

of summons no jurisdiction could be obtained, since there was no *res* involved. Jurisdiction cannot be obtained by publication of summons when the only property involved is money which is deposited in court.

Cross *v.* Armstrong, 44 Ohio St. 623.

If this state of the case the only recourse left to the defendant company was to defend the action in Honolulu and trust that the same conclusions would be reached by both the Hawaiian and Californian courts. This was done, and in the briefs filed there all the points which are considered by this court in its opinion were discussed at great length. Especially was the proposition dwelt
201 upon that Mrs. McGrew had become domiciled in another jurisdiction pending the divorce case, and that by reason of this change of domicile the personal property of Mrs. McGrew had passed from without the operation of the Hawaiian statute. The court held this plea to be notwell taken, saying, 10 Hawaiian Reps. 570:

"But however that may be, both parties were undoubtedly domiciled here when the divorce proceedings were commenced, and when the court acquired jurisdiction over them, and that was sufficient so far as the question of domicile was concerned. The court having acquired jurisdiction under these circumstances, the incidents of the divorce would follow according to the law of the place of divorce."

And that opinion also stated, p. 568:

"The company not having brought the widow into court by interpleader is in the unfortunate position of being subjected to two suits, one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern, whether the action is brought in Hawaii, California or New York. In our opinion that law is the law of the place of domicile and divorce. We can only assume that the California court will take the same view."

This court has not taken the same view, and, by reason of these diametrically opposite opinions upon the same question, the defendant company is obliged to pay the same policy twice. Such
202 a result has not been brought about by any neglect or failure on the part of the defendant to avail itself of every defense known to the law.

In the light of what is said in the opinion by this court and of subsequent developments, it cannot be seen what possible argument or objection could have been raised to the proceedings in Hawaii which was not raised.

We believe the case to be without a parallel, in the sense that, while frequently double payments of the same claim have been enforced, nevertheless it has been through some fault or negligence on the part of the debtor. But here the result is brought about through the weakness of the judicial system the protection of which has been invoked.

We trust that only after the fullest argument will this court by

its deliberate judgment refuse to follow the decision of the Hawaiian court which had jurisdiction both over the persons and the property involved, and which would seem to be the proper tribunal to decide the question.

We desire the opportunity of arguing this cause upon the following propositions:

First. The judgment in the case of Carter *v.* Mutual Life is conclusive in this case as to the effect of the divorce proceedings upon this policy of insurance.

At the time the divorce proceedings were commenced both Mr. and Mrs. McGrew were domiciled in Hawaii. The application for
203 the policy was made there, and there the policy was delivered, through the agent of the company. Thus all three parties to the transaction, viz: the insured, the beneficiary and the insurance company were domiciled there. Furthermore, the policy recited that it did not go into effect until the first premium was paid. That payment was made in Honolulu and there accepted by the company. (Fol. 7.) It was therefore unequivocally an Hawaiian contract and governed by the laws of that republic. The *lex domicilii* and the *lex loci contractus* concur. That under such circumstances the policy is to be governed by the laws of Hawaii, is directly decided by the very recent case in the Supreme Court of the United States, of

Mutual Life Ins. Co. *v.* Cohen, 21 Sup. Ct. Rep. 105, where a policy of precisely similar form to the one here involved was considered, the court saying:—

"The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the State of Montana. Under those circumstances under the general rule, the contract was a Montana contract and governed by the laws of that State."

By the decision of the Hawaiian court in this case of Carter *v.* Mutual Life, it was held that, by the commencement of the divorce proceedings the personal property of Mrs. McGrew was neces-
204 sarily involved, because it was a necessary incident of the divorce proceedings.

They decided also, and such decision was necessarily involved in their conclusion, that this life-insurance policy passed to the plaintiff in the divorce proceedings notwithstanding the fact that the defendant had changed her domicile *pendente lite*.

This construction by the Hawaiian court of the effect of their own statute upon a case in their own court is conclusive upon this court.

The settlement of property rights between the parties upon the dissolution of the marriage status is, as said in Gaston *v.* Gaston, 114 Cal. 542, ordinarily an incident of the judgment of divorce.

The Hawaiian court has decided that this particular statute makes the alienation of the wife's personal estate a necessary incident of a divorce upon this special ground.

This judicial definition of the effect of the local statute is conclusive. As said by Story on Conflict of Law, sec. 230 (*b*)

"Incidents of a foreign divorce are also fairly to be deduced from the law of the place where it is decreed. If valid there the divorce will have, and it ought to have, all the effect in every other country upon personal property locally situated there which are properly attributable to it in the forum where it is decreed."

There can be but one right construction of this statute and
205 its effect upon the divorce proceedings. That construction was the same when Carter *v.* Mutual Life was decided as it is now. It is our claim that the construction by the Hawaiian court should be followed by this court, because:—

"A decision of the highest judicial tribunal of a foreign state construing one of its statutes, is to be received elsewhere as an authoritative exposition. Nor is its weight or authority affected by the fact that it was made after the occurrence of the transaction in question, or after the departure from the State of the person affected by it."

Sutherland on statutory construction, sec. 191.

"The principle is that by the *comitas gentium* the courts of the several States must be permitted to construe their own statutes, and it is founded in justice and reason. The courts of each State must be presumed best to understand all the circumstances which influence the judicial construction of the statute."

Bloodgood *v.* Grasey, 31 Ala. 571.

At an early period in the history of the jurisprudence of this country it was decided by Chief Justice Marshall, in Elmendorf *v.* Taylor, 10 Wheaton, 152, that

"We receive the construction given by the courts of the nation as the true sense of the law and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statutes."

And this decision has been uniformly followed by both the Federal and State courts of last resort.

206 To the Hawaiian tribunal therefore must reference be had to ascertain what is a necessary "incident" of a divorce suit brought under this special statute. This definition is conclusive upon this court just as the decision of a California court would conclude an Hawaiian tribunal in the application of the civil code to the property rights of parties divorced here.

But in order to uphold the decision heretofore rendered in this case, it is necessary for this court to decide that the Hawaiian court made a mistake in construing the Hawaiian statute. The obstacle lies at the threshold of plaintiff's case. But the fact that an action was brought by the administrator against the defendant company in Hawaii, and that by that action the company was compelled to pay this loss, is not even referred to in the opinion of this court, except inferentially. Nor is the fact mentioned, that the Hawaiian supreme court has reached an opposite conclusion as to the effect of this local statute.

We respectfully submit that even if the decision of the Hawaiian

court were not binding upon this court, still it at least would merit the distinction of being noticed and distinguished. Indeed, from the opinion by this court, it would appear that the defendant company were in a position of trying to evade this loss, and that it was not through legal compulsion it paid in Hawaii.

207 We again submit that this is hardly a fair statement of the facts or a recognition of the real question at issue.

We therefore respectfully suggest that this Hawaiian case, involving as it does the precise question here raised, should be referred to, and if erroneous, that the reasons distinguishing it should be given. Further, if this court does not wish to adopt the rule that the construction of a foreign court upon its local statute is conclusive, that such decision should be clearly stated.

Second. The Hawaiian judgment in Carter *v.* Mutual Life is conclusive upon another ground.

The theory upon which the opinion proceeds is, that the law of the owner's domicile controls in regard to his personal property. The respondent's whole case must rest upon this proposition.

Whitney *v.* Dodge, 105 Cal. 192,

is relied upon by the court as a precedent. That personal property is, as a general rule, governed by the law of its owner's domicile is undoubted. But this is a rule which has many exceptions. The Civil Code, sec. 946 says:

"If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of the owner and is governed by the law of his domicile."

And in the opinion cited it is said by Mr. Justice McFarland:

"Any State would have the rightful power to provide that the rule above stated should not prevail within its jurisdiction."

208 And in

Farmers' and Mechanics' Nat. Bank *v.* Loftus, 7 L. R. A. 313,

it is said:

"In one sense personal property has locality, that is to say, if tangible it has a place in which it is situated, and if invisible (consisting of debts) it may be said to be in the place where the debtor resides; and of these circumstances the most liberal nations have taken advantage by making such property subject to regulations which suit their own convenience. Every country has the right of regulating the transfer of all personal property within its territory, but when no positive regulation exists, the owner transfers it at his pleasure."

Dicey on Domicil, p. 265, says:

"Where there is a conflict between the law of the country in which the personal property is situated and the law of the owner's domicile, the *lex situs* will in general prevail."

And it must be said that the tendency of modern authorities under the influence of the civil law is toward the recognition of the

law of the *situs*, to such an extent that what was an exception is tending to become the rule.

Storey Conflict of Law, sec. 383;
Wharton Conflict of Law, secs. 346, 353.

The property here involved was a chose in action, and the question is, What was its *situs?*

As before stated, it cannot be doubted that the *lex loci con-*
209 *tractus* was of Hawaii, and being an intangible thing, the *lex situs* was of the country where the debtor resides. In the present case this was undoubtedly Hawaii, where the premium was paid to the agent and the policy delivered. This flows as a necessary conclusion from the decision of the Supreme Court of the United States in the N. E. Mutual Life Ins. Co. *v.* Woodruff, 111 U. S. 138. In that case it was held, that letters of administration could be taken out upon the estate of the insured in Illinois, although she had never resided in that State, and the only property which she had there was a policy of insurance issued by the defendant company which had a local agent there upon whom process could be served. It was held that the insurance company although incorporated and having its principal place of business in another State must be regarded as having a domicile in the State of Illinois "in the sense of the rule that the debt of the policy is assets at its domicile."

Not only was the debtor domiciled in Hawaii, as far as this claim was concerned, but the evidence of the indebtedness, viz., the policy, was always in Hawaii, and was returned to the company cancelled when the loss was there paid to the administrator of McGrew's estate.

If, then, there was anything in the laws of Hawaii which stated that the *lex domicilii* should not govern in cases of this character, it must follow that the fiction of plaintiff's rights in this policy following her to California does not apply.

210 We claim that there did exist such a provision in the laws of Hawaii, as must appear at once from the reading of the treaty rights then existing between the United States and that country, where it was provided:

"If the question should arise among several claimants as to which of them said goods belonged, the same should be decided finally by the laws and judges of the land wherein the said goods are."

This treaty is as much a part of the law of the State of California as its own local law and constitution.

Hauenstein *v.* Lynham, 100 U. S. 483.

Therefore the decision of the Hawaiian court in Carter *v.* Mutual Life is controlling, because it is the decree of a court where the "goods were."

Third. The divorce suit was concerned with personal property rights from its commencement.

It is stated in the opinion of the learned justice that the plaintiff here is concluded by the Hawaiian judgment in the divorce case as

to the one thing adjudicated therein only; that there were no property rights averred or considered or adjudicated therein, and that therefore Mrs. McGrew's rights to her personal property were not affected by the mere pendency of the suit.

It is upon this assumption also that the whole case of respondent must rest It is this part of the opinion to which we desire
211 to pay especial attention, for we insist that the personal property rights of Mrs. McGrew were involved from the commencement of the divorce action; that since they were so involved her departure from Hawaii could not in any way subtract from that jurisdiction.

The pertinent inquiry then is, What was the subject-matter in the suit of McGrew *v.* McGrew? We answer, first, dissolution of the marriage tie; second, custody of the child; third, alienation of the wife's personal estate.

It is undoubted that all divorce jurisdiction rests upon statute. It is not a common-law proceeding. The court in dealing with the dissolution of the marriage tie and the rights incident thereto, has such jurisdiction as the legislature confers upon it and none other. As was said in Hopkins *v.* Hopkins, 39 Wis. 171,

"It is a general principle of the law of divorce in this country that the courts, either of law or of equity, possess no powers except such as are conferred by statute; and therefore authority for the action of the court in that class of cases must be found in the statute and cannot be looked for elsewhere."

This power of the legislature is unlimited, as is shown by the fact that it may without notice and without any judicial proceeding dissolve the marriage tie.

Maynard *v.* Hill, 125 U. S. 190.

Therefore, in any consideration of the effect of this Hawaiian
212 judgment, the first step is to read the statute into the pleadings, and then see the scope of the proceeding. From such reading the conclusion seems inevitable that the wife's personal estate was necessarily involved in every suit for divorce brought in the Hawaiian court for the special offense charged. The statute gave to the wronged husband, upon divorce, the same rights which the common law gave him upon marriage. The terms of the statute are a part of every libel for divorce filed, and in such a case any allegation of property rights in the pleadings, or prayer concerning them, is unnecessary and, indeed, improper.

Barrett *v.* Failing, 6 Saw. 473;
(Affirmed in 111 U. S. 523);
Bamford *v.* Bamford, 4 Or. 30;
Smith *v.* Smith, 13 Mass. 231.

This proceeding, therefore, was something more than a suit for divorce and it had as much effect upon the personal estate of Mrs. McGrew from its commencement as it would had there been allegations in the libel touching her personal estate, and a prayer for its alienation. When respondent was served with a libel for divorce,

the law forced upon her the knowledge that there was inserted therein a prayer that, upon rendition of the decree, her personal estate should pass to the plaintiff. Can it be said, then, that this personal estate was not involved in this case from its commencement? By what possible change of her domicile after
213 the commencement of the proceedings could she voluntarily evade the force of the judgment which might thereafter be rendered?

We again beg to impress upon the court that we are not concerned with the doctrine of *lis pendens*. We admit that in an ordinary action for divorce in this jurisdiction, where no mention is made of property rights in the pleadings, the prayer being merely for divorce and alimony, a *bona fide* transfer of property by the defendant to an innocent third party *pendente lite* gives to the latter a good title. This is based upon the law of notice. But in the present case the rights of a third party are not involved. The plaintiff here is the same person who was the defendant there, and it is quite impossible to reach the conclusion that Mrs. McGrew after she was served with the libel did not have notice that her personal estate was involved in the litigation.

The general rule that personal property follows the person of its owner cannot apply when that owner removes to another domicile with full notice that her claim of ownership is disputed. This knowledge alone is as concerns her title sufficient to impress a claim upon the property right. It is stated in the opinion of this court that the rule that the domicile of the wife follows that of the husband is sometimes called a "fiction." Therefore the rule that personal property follows the person of its owner is also a fiction. But fictions
of law hold only in respect "to the ends and purposes for
214 which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

Morris *v.* Pugh, 3 Burr. 1243.

The reason of the rule that personal property follows the person of its owner is to prevent confusion as to the true title. It is primarily for the benefit of third parties, in order that they may know what law correctly defines the title. But this does not apply to the present case because the matter arises *inter sese*.

We claim, therefore, that Mrs. McGrew, with the notice which she had of litigation pending, did not bring to California the unrestricted and free ownership of this policy of insurance, but it was necessarily coupled with a condition which might defeat that ownership altogether.

The decision in this case must hold what is indeed a dangerous principle. It must decide that a defendant in a divorce proceeding may, by acquiring another domicile *pendente lite* deprive the original court of any power to dispose of personal property belonging to the community, unless an attachment or special lien has been impressed upon it. For example, a husband is sued for divorce in California, on the ground of adultery or extreme cruelty. Among

the property rights mentioned in the pleadings is a chose in action which belongs to the community estate.

215 This is our case. In the Hawaiian jurisdiction the law inserted a mention of the wife's personal estate in the pleadings. It is within the power of the court of California to award all of this community interest to the innocent party (Civil Code, sec. 146), and it can by this decree enlarge the wife's estate from a mere expectancy to that of an ownership in fee.

Can it be said that the defendant, as soon as he is served with papers in such a suit, may transfer his domicile to Nevada, thereby preventing the courts of this State from awarding the property in question to the wife? Can he by his change of domicile deprive the court of its jurisdiction previously vested?

The decision in this case must necessarily answer the preceding question in the affirmative, and hold that in such a case the property in question had quite passed beyond the jurisdiction of the California court and any order which it might make concerning it would be a nullity.

If such be the law we doubt not that there will be a general exodus of recreant spouses when summoned into court to answer for their misdeeds. All they will have to do will be to transfer their property into personal estate and take it with them. Having once gotten it beyond the borders of the State, they may take up a new home and enjoy the riches thus transported, free from any fear that the judgment in the Californian court may afterwards be enforced in the new jurisdiction.

216 The case at bar presents features infinitely stronger in favor of our supposition than does this supposititious case; for the Hawaiian statute is mandatory, whereas the Californian statute confers discretionary powers. By the former the *the* alienation of the estate flows from the operation of the law; by the latter from the decree of court.

Now assuming that the Hawaiian statute had expressly said that, upon a rendition of a decree of divorce for the wrong specified, the husband should hold his wife's personal estate forever and the same shall be affected by the divorce proceedings from the commencement. The legislature of Hawaii had full power to make such a law if it saw fit. But we ask what possible force would such a statute have over that which did exist? So far as it affected third parties it might be of greater efficacy in giving them notice, but as to the parties to the action they now receive notice by the service of process and the very fact that the action is commenced.

As previously stated, the foregoing propositions have never been argued before this court. The case is one of first instance.

We submit that they are of too great importance not to be directly passed upon.

Respectfully submitted,

CHICKERING & GREGORY,
Attorneys for Appellant.

217 In the Supreme Court of the State of California.

ALPHONSINE McGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Petition for Writ of Error to the Supreme Court of the State of California.

To the Honorable William H. Beatty, chief justice of the supreme court of the State of California:

The petition of the Mutual Life Insurance Company of New York for a writ of error to the supreme court of the State of California respectfully represents:

First. That heretofore, to wit, on or about the — day of ——, 1895, one Alphonsine McGrew commenced an action in the superior court of the city and county of San Francisco, State of California, department three thereof, against your petitioner, to recover from it the sum of five thousand (5,000) dollars with interest thereon from February 9, 1895, and costs of suit.

Second. That the complaint in said action was in the ordinary form of a complaint upon the expressed promise of the defendant company to pay to the said Alphonsine McGrew the said sum
218 of five thousand (5,000) dollars as the amount of an insurance policy theretofore issued by said defendant company upon the life of Henri Goulden McGrew, and payable to said Alphonsine McGrew as beneficiary.

Third. That thereafter, to wit, upon the 14th day of August, 1895, said Alphonsine McGrew filed an amended complaint, which in all material respects was similar to the original complaint in said action, and thereafter, to wit, upon October 15th, 1895, an amendment to said amended complaint was filed.

That thereafter, to wit, upon May 19, 1897, the defendant filed an amended answer to said amended complaint, wherein the defendant denied that it was indebted to plaintiff in any sum, and alleged that prior to the institution of said action by Alphonsine McGrew, an action had been brought by the administrator of the insured, to wit, Henri G. McGrew, in the circuit court of the first judicial circuit of the Republic of Hawaii, which said action was designated as "J. O. Carter, administrator, *vs.* Mutual Life Insurance Company of New York," and was brought to recover the amount due on said policy of insurance, to wit, the sum of five thousand (5,000) dollars. Said answer further alleged that a final judgment had been rendered in said action of Carter *vs.* Mutual Life Insurance Company, in favor of the plaintiff therein, and that said company was compelled to satisfy the said judgment and to pay the amount thereof, to wit, $5,599.59, and it received back the said policy of insurance, duly canceled.

Fourth. That, according to the laws of the State of Cali-
219 fornia and the practice there prevailing, said answer was sufficient to put in issue the right of recovery on the part of said plaintiff.

That thereafter, to wit, on May 13, 1897, said action of Alphonsine McGrew *vs.* Mutual Life Insurance Company of New York was tried by said superior court of the city and county of San Francisco, and in said action it was claimed by the defendant that it was not indebted to said Alphonsine McGrew, because it had already paid the said policy of insurance by reason of the judgment rendered in said Hawaiian court, which said court had jurisdiction over all the parties thereto. It was further claimed by said defendant company that, prior to July, 1894, an action had been commenced by said Henri G. McGrew by his guardian, Charles L. Carter, against said Alphonsine McGrew, for a divorce; that in said action said Alphonsine McGrew was duly served with process in the Republic of Hawaii, where all the parties to said action were then domiciled, and thereafter appeared in said action and defendant the same.

That said action prayed for a divorce from the said Alphonsine McGrew, upon the ground of adultery of said Alphonsine McGrew, and that said circuit court of Hawaii, wherein the said divorce action was pending, was a court of competent jurisdiction and then had jurisdiction over all the parties to said action and said cause of divorce.

That thereafter, to wit, upon the 18th and 20th days of August, 1894, said divorce cause was heard by said circuit court of Hawaii, and both parties appeared therein, and subsequent thereto, to wit, on August 23rd, 1894, a decision was rendered by said circuit
220 court dissolving the bonds of matrimony theretofore existing between said parties, upon the ground of adultery of said Alphonsine McGrew; that said decree of divorce has ever since been, and now is in full force and effect.

That there was, at the time of said divorce action being instituted, and also at the time said decree of divorce was granted, a statutory law of the said Republic of Hawaii, which provided:

"When a divorce is decreed for the adultery, or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live, and if he shall survive her, and there shall be issue to the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by courtesy; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her as it may deem proper."

Fifth. That said circuit court of Hawaii, in said action of J. O. Carter, administrator, against the Mutual Life Insurance Company of New York, had decided, prior to the trial of this cause, that all the interest of said Alphonsine McGrew in and to said policy of insurance and the money stipulated to be paid thereby had, by said action and decree of divorce, become the property of said Henri G. McGrew, and upon his death passed to the administrator of his estate, to wit, said J. O. Carter, and that said property right

of Alphonsine McGrew was a necessary incident of said divorce action.

That said policy of insurance was delivered by said defendant company, through its agent at Honolulu, to the said insured at Honolulu, and the premiums were paid thereon, and the said policy was, during all the times herein mentioned, in said city of Honolulu.

221 Sixth. It was further claimed that by a treaty concluded between the United States and the Kingdom of Hawaii, in 1849, it was provided:

"That if a question should arise among several claimants as to which of them said goods belonged, the same shall be decided finally by the laws and judges of the land wherein said goods are."

Seventh. That thereafter, to wit, upon the 11th day of October, 1897, the said superior court of the city and county of San Francisco, pursuant to the law and practice of California, made its findings and decision in writing, and found that the plaintiff was entitled to a judgment against your petitioner for the sum of five thousand (5,000) dollars, together with interest thereon from February 9th, 1895, and for her costs of suit; and thereafter, to wit, upon said October 11, 1899, said judgment was recorded in Book 39 of Judgments, page 229, in the office of the clerk of said superior court.

That thereafter, to wit, upon November 2, 1897, in accordance with the law and practice of the State of California, your petitioner gave notice of an appeal from said judgment of said superior court to the supreme court of the State of California; and thereafter, and within due time filed its transcript on said appeal in said supreme court.

Eighth. That the supreme court of the State of California consists of two departments, and said appeal was assigned to department number two for hearing and determination, and that under the rules of said supreme court, appellant shall file with the clerk its points and authorities, and within thirty days thereafter respondent

222 shall file his points and authorities, and within ten days thereafter appellant may file *her* reply, and that all of said points and authorities constitute part of the record on appeal in said supreme court.

Ninth. That said briefs on behalf of appellant and respondent were filed in accordance with said practice of the supreme court of the State of California, and extensions of time so to do duly granted.

That in the briefs filed by said appellant, your petitioner, it was claimed that the judgment of said superior court contravened the treaty rights conferred upon it by said treaty existing between the United States and the Kingdom of Hawaii, in that the said superior court had refused to follow the decisions of the courts of Hawaii, heretofore referred to, wherein it was decided that said insurance policy became the property of Henri G. McGrew upon the decree of divorce being rendered, and that the judgment of said superior court was erroneous in that it did not allow the ownership of the said policy to be decided by the laws and judges of the land wherein the said goods were.

That said appeal was submitted to said department number

two without argument; and thereafter the said cause was by said supreme court ordered to be heard by said supreme court sitting in bank, in accordance with the law and practice of said court; and thereafter, to wit, upon February 28, 1901, said supreme court rendered its decision on said appeal, affirming the judgment of said superior court.

That under the provisions of the constitution of the State
223 of California judgment of the supreme court of the State becomes final upon the expiration of thirty days after such judgment is pronounced.

That your petitioner filed a petition for rehearing in said supreme court, on March 20, 1901, and that said supreme court, on March 29, 1901, denied said petition, and said judgment pronounced by said supreme court is the final judgment of the highest court in the State of California in which a decision in said action can be had, and that in said action was drawn in question the validity of the rights conferred by said treaty existing between the United States and said Kingdom of Hawaii, and the decision of said supreme court of the State of California was against the rights conferred by said treaty.

Tenth. That said supreme court did not directly pass upon the rights conferred by said treaty, but the said court could not have reached its conclusion averse to your petitioner without holding against the validity of the rights conferred upon your petitioner by said treaty, and the adjudication of said question was necessarily involved in the decision on said appeal by said supreme court of the State of California.

Your petitioner presents herewith a copy of the record on appeal to the supreme court of the State of California in said action, and hereby refers to and makes the same a part of this petition.

Wherefore, your petitioner respectfully prays that a writ of error be granted to the supreme court of the State of California, pursuant to the law and practice in that behalf.

CHICKERING, THOMAS & GREGORY,
Attorneys for Petitioner.

224 In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Assignment of Errors.

On this 30th day of March, 1901, came the Mutual Life Insurance Company of New York, a corporation, by Chickering, Thomas & Gregory, its attorneys, and say that in the records and proceedings in the above-entitled action there is manifest error in this, to wit: By the records aforesaid it appears that the judgment given and entered in said suit against said defendant and in favor of said plaintiff should have been given for said defendant and against said plaintiff, for the following reasons:

First. That the ownership of the policy upon which said suit is based had been decided by the courts of last resort of the Republic of Hawaii to be in Henri G. McGrew and not in said plaintiff, and therefore the decision of this court in said cause is repugnant to the provisions of the treaty then and now existing between the United States and the Republic of Hawaii, by which it was provided, among other things, "that if a question should arise among several claimants,
as to which of them said goods belonged, the same should be
225 decided finally by the laws and judges of the land wherein
said goods are," and the decision of this court deprives said petitioner of a right conferred by said treaty.

CHICKERING, THOMAS & GREGORY,
Attorneys for Petitioner.

Said writ is allowed this 6th day of April, A. D. 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

225½ [Endorsed:] S. F. No. 1230. In the supreme court of the State of California. Alphonsine McGrew respondent *vs.* Mutual Life Insurance Co. of New York, appellant. Petition for writ of error to the supreme court of the State of California, and assignment of error-. Filed Apr. 6, 1901 Geo. W. Root, clerk By A. E. Homlein, deputy. Chickering & Gregory, attorneys-at-law, 222 Sansome street, San Francisco, Cal.

226 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Alphonsine McGrew, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, in the District of Columbia, within sixty days from date hereof, pursuant to writ of error filed in the clerk's office of the supreme court of the State of California, wherein Mutual Life Insurance Company of New York, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. W. H. Beatty, chief justice of the supreme court of the State of California, the 6th day of April, 1901.

W. H. BEATTY,
Chief Justice Supreme Court of California.

Receipt of the within citation is hereby admitted this 6th day of April, 1901.

PLATT & BAYNE,
Attorney- for Defendant in Error.

226½ [Endorsed:] Original. S. F. No. 1230. Supreme court of the State of California. Alphonsine McGrew *vs.* Mutual Life Ins. Co., a corporation. Citation. Filed Apr. 9, 1901. Geo. W. Root, clerk. By W. E. Boody, deputy. Chickering & Gregory, attorneys-at-law, 222 Sansome street, San Francisco, Cal.

227 In the Supreme Court of the State of California.

ALPHONSINE MCGREW, Respondent,
vs.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a Corporation, Appellant.

Know all men by these presents: that we, Mutual Life Insurance Company of New York, a corporation, as principal, and Warren Gregory and Stanley Forbes as sureties, are held and firmly bound unto Alphonsine McGrew in the full and just sum of one thousand (1,000) dollars, to be paid to the said Alphonsine McGrew, her certain attorney, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 6th day of April, in the year of our Lord nineteen hundred and one.

Whereas, lately in the supreme court of the State of California, in the suit pending in said court between said Alphonsine McGrew, plaintiff, and said Mutual Life Insurance Company of New York, defendant, a judgment was rendered against said defendant and in favor of said plaintiff, and said defendant having obtained from the chief justice of said supreme court of the State of California
228 a writ of error to reverse said judgment in the aforesaid suit, and a citation directed to said Alphonsine McGrew, citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at the city of Washington, District of Columbia, within sixty days from date hereof;

Now the condition of the above obligation is such, that if the said Mutual Life Insurance Company of New York, a corporation, as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if defendant fail to make *their* plea good, then the above obligation to be void, otherwise to remain in full force and effect.

THE MUTUAL LIFE INSURANCE — OF NEW YORK,
By A. B. FORBES, *Gen'l Agent.*
STANLEY FORBES.
WARREN GREGORY.

[Notary Seal and Acknowledgment.]

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Warren Gregory and Stanley Forbes, the sureties named in the foregoing bond being duly sworn, each for himself, deposes and says: that he is a householder in said State of California and is worth the sum of one thousand (1,000) dollars, exclusive of property exempt from execution, over and above all his just debts and liabilities.

WARREN GREGORY.
STANLEY FORBES.

W. E. B.

Subscribed and sworn to before me this 6th day of April, 1901.

ALFRED A. ENGUIST,
Notary Public, etc.

W. E. B.

229 Form of bond and sufficiency of sureties approved this 6th day of April, 1901.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

W. E. B.

230 [Endorsed:] S. F. No. 1230 In the supreme court of the State of California. Alphonsine McGrew respondent *vs.* Mutual Life Insurance Co., of New York, appellant. Bond. Filed April 6th 1901 Geo. W. Root clerk by A. E. Hemlein deputy Chickering & Gregory attorneys-at-law 222 Sansome street San Francisco, Cal.

231 In the Supreme Court of the State of California.

I, Geo. W. Root, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of record*e*rs in S. F. 1230 McGrew *vs.* Mutual Life consis-ing of pages one to two hundred and twenty-nine—and same constitute all paper- on writ of error in above-entitled cause as shown by the records of my office.

Witness my hand and the seal of the court, this 7th day of May, A. D. 1901.

[Seal Supreme Court of California.]

GEO. W. ROOT, *Clerk,*
By W. E. BOODY, *Deputy.*

[Endorsed:] S. F. No. 1230. In the supreme court, State of California. McGrew *vs.* Mutual Life Insurance.

232 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State

of California, before you or some of you, being the highest court of the said State of California in which a decision could be had in the action between Alphonsine McGrew, plaintiff, and Mutual Life Insurance Company of New York, a corporation, defendant, wherein was drawn in question the validity of a provision of a treaty existing between the United States and the Republic of Hawaii, and the decision of the said supreme court of the State of California being against a right conferred by a provision of said treaty, a manifest error hath happened to the great damage of said Mutual Life Insurance Company of New York, a corporation, as aforesaid, as by their complainant appears, we being willing that error, if any hath been done, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on
Monday the 3rd day of June next, in the Supreme Court of
233 the United States, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of April, in the year of our Lord nineteen hundred and one.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Northern District of California, in the Ninth Circuit,
By W. B. BEAIZLEY, *Deputy Clerk.*

Allowed by—
W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

234 [Endorsed:] S. F. 1230 Original Supreme Court of the State of California Alphonsine McGrew *vs.* Mutual Life Ins. Co., a corporation Writ of error to the supreme court of California. Filed Apr. 6 1901 Geo. W. Root, clerk. By A. E. Homlein, deputy. Chickering & Gregory attorneys-at-law 222 Sansome street San Francisco, Cal.

Endorsed on cover: File No. 18,187. California supreme court. Term No. 336. The Mutual Life Insurance Company of New York, plaintiff in error, *vs.* Alphonsine McGrew. Filed May 25th, 1901.

COPY BOUND CLOSE IN CENTER

No. 936. 109
Brf. of Davies, Short & McKenney
Office Supreme Court, U.S.
FILED
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JAMES H. McKENNEY,
Clerk
Supreme Court of the United States.
Chickering & Gregory for D. E. (m
OCTOBER TERM, 1901.
Filed Nov. 5, 1901.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERIC D. McKENNEY,
W. H. CHICKERING,
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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 336.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

ALPHONSINE McGREW.
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Opposition to Motion to Dismiss Writ of Error.

GENERAL STATEMENT.

The writ of error at bar involves interesting questions as to the effects of judgments in the newly-acquired territory of Hawaii.

Two pages are given in the motion to dimiss to the jurisdictional questions and some eight pages to the merits, indicating that this motion is not so much one to dismiss as to obtain an advance hearing on the merits, and that the questions on the merits present the real difficulty.

And the California Court apparently found them so,

for it held the case under advisement *three* years before deciding it (fols. 81–190). Some reference is made in the motion to dismiss to harsh treatment on the part of the husband (which is contrary to the evidence) (fol. 56), but this is as uncalled for as was statement of the California Court that the defense "is rather a remarkable one" (fol. 190), and that the evidence as to the wife's adultery was conflicting (fol. 192), or as would be a statement by this plaintiff in error that the defendant had married an actor and gone to France, presumably forever.

This was an action commenced in 1895, in the State Court of California by Alphonsine McGrew, the divorced wife of Henri McGrew, to recover on a policy of life insurance which had been paid to the administrator of Henri McGrew (who died October 22, 1894), under a final judgment in the Courts of Hawaii in an action brought by such administrator against this Company in 1894. The amount adjudged due was paid to McGrew's administrator, and the policy was delivered up to the company for cancellation. Mrs. McGrew is attempting, therefore, to collect the same policy over again from the Company. The administrator of Henri McGrew succeeded in the action in Honolulu on the ground that under the Hawaiian Law all the personal property of Mrs. McGrew had vested in Henri McGrew by virtue of a decree of absolute divorce on the ground of adultery.

Mrs. McGrew was a party to the Hawaiian suit for divorce, but left Honolulu April 5, 1894, while the divorce action was pending, and before McGrew's death. She commenced this suit in California, in August, 1895, and the California Court disregarded the judgments of the Hawaiian Court and gave judgment against this Company on the ground that Mrs. McGrew subsequent to the commencement of the action for divorce had changed her domicile to California and thereby removed the policy

or her beneficial interest therein from the jurisdiction of the divorce case.

In the Superior Court of the City and County of San Francisco, the plaintiff in error here, defendant there, pleaded (1) said decree of divorce, (2) the Hawaiian statute which provided that "when a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever," * * * * and averred that under the provisions of such law and decree of divorce, all rights of the said Alphonsine C. McGrew (the assured) in and to said policy of insurance passed to the said Henri G. McGrew and became his absolute property free and clear of any claims of said Alphonsine. Plaintiff in error also further pleaded the payment of the amount of said policy with interest and costs to the administrator of said Henri by virtue of the judgment of the highest court of the Republic of Hawaii and the surrender of the policy for cancellation (pp. 7 and 8).

The company thus claimed in the California Courts and claims here that the judgment of the Hawaiian Court was binding and that it is protected by such judgment not only under the decisions of this Court but also by virtue of a then existing treaty between the United States and Hawaii, which claim the Supreme Court of California denied. The treaty will be found at page 550 of "Treaties and Conventions concluded between the U. S. and other Powers" (1889). The construction of Treaties is "the peculiar province" of this Court (Jones *v.* Meehan, 175 U. S., 22), and the plaintiff in error should not be concluded on this point by a *State* Court.

The Federal Questions.

There can be no dispute but that the Federal questions were, as a matter of actual fact, fully presented to the

Courts of California, and opposing counsel do not contend that such questions were not presented. They base their motion entirely upon the way the questions were presented as shown by this record and claim that they were not presented in such a way that this Court ought to review the action by the State Court of California.

Under the circumstances of this case, viz., the former payment of this policy under the final judgment of a Court of competent jurisdiction, and this being an attempt by another party to collect the same policy, we do not think this Court will be astute to discover technical obstacles in the way of at least having all the questions in the case fully discussed before it on a regular hearing in its order.

Summary of Argument in Opposition to Motion to Dismiss.

1. The federal questions were claimed in the State Trial Court by the pleadings, proof and assignments of error, and necessarily, therefore, in the Supreme Court on appeal.

2. The federal questions were consequently claimed, as stated in Point I above, before the Supreme Court of California on appeal, and were fully presented by counsel as shown by the briefs before the latter Court.

3. The treaty in question was involved in the decision of the Supreme Court of California, and applies to this case.

4. The opinion of the Supreme Court of California expressly referred to the federal question.

5. The federal question was presented the second time to the Supreme Court in the petition for rehearing, and such petition was denied, and such decision necessarily in-

volved the federal question. *The existence of this petition for a rehearing is ignored in the moving papers.*

6. The defendant in error erroneously attempts on this motion to bring before this Court prematurely the construction and effect of the treaty. It is sufficient here to point out the general features of the question which would come before this Court when the merits are reached, in addition to what has been said in the preceding points.

This Court should not prematurely consider the case on the merits, as invited by the moving party.

POINT I.

The Federal questions were claimed in the State Trial Court by the pleadings, proof, and Assignments of Error in the Trial Court, and necessarily therefore in the Supreme Court on appeal.

The merits of this motion cannot be disposed of by the mere application of one or more of the decisions of this Court which covers perhaps only one feature of the case. When the record which we present is illumined by the broad-minded and oft-repeated test announced by this Court, that is, was the mind of the State Court directed to the fact that a right protected by treaty was relied upon, it is impossible to come to any other conclusion than that this Court has jurisdiction.

In the argument presented this Court is asked to bear in mind its unanimous statement in French *vs.* Hopkins, 124 U. S., 524, as follows:

" The record fails to show, either *expressly or by im-*
" *plication, that* any 'right, title, privilege or immunity'
" under the Constitution or laws of the United States, was
" 'specially set up or claimed' in either of the Courts
" below."

We maintain that our claim was made expressly and also by implication in the Courts of California, and in considering § 709, quoted in Brown *vs.* Massachusetts, 144 U. S., 579, the Court says the objection was not " taken in " any form, either expressly, or *by any possible inference* " *or implication before* verdict " nor afterwards.

In Butler *vs.* Gage, 138 U. S., 61, this Court says:

" The Supreme Court of the State confessedly went to judgment without any suggestion that a Federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the Court."

In Sayward *vs.* Denny, 158 U. S., 184, this Court says:

" The right on which the party relies must have been called to the attention of the Court, in some proper way, and the decision of the Court must have been against the right claimed. Hoyt *vs.* Sheldon, 1 Black, 518; Maxwell *vs.* Newbold, 18 How., 511, 518. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision" (Powell *vs.* Brunswick County, 150 U. S., 400, 433).

In Oxley Stove Co. *vs.* Butler, 166 U. S., 653, this Court laid down the following:

" Looking into the record we do not find that any ref-

" erence was made in the Court of original jurisdiction to " the Constitution of the United States. Nor can it be " inferred from the opinion of the Supreme Court of Mis- " souri that that Court was informed by the contention of " the parties that any Federal right, privilege or im- " munity was intended to be asserted. For aught that " appears the State Court proceeded in its determination " of the cause without any thought that it was expected " to decide a Federal question."

Submitting this case to such test, it will be manifest from what follows that it can be inferred from the California opinion that that Court was informed by contention of the plaintiff in error that a Federal right was intended to be asserted. And it would be preposterous in this case to claim that the California Court proceeded in its determination without any thought that it was expected to decide a Federal question.

This Court has thus been governed by the broadest consideration.

And in one of its cases, the citation of which we have not at hand, this Court has said one test is whether the mind of the State Court has been directed to the right claimed.

Again, this Court has frequently taken jurisdiction where the judgment of a *sister State* is pleaded as *res adjudicata* in the State Court, although *no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.*

That is, the *pleading* was a sufficient compliance with the clause in § 709 "specially set up or claimed." Thus in Bell *vs.* Bell, 181 N. Y., 175, the defendant pleaded the judgment for divorce in Pennsylvania, but did not otherwise specially set up or claim any right under Const, Art. IV, *and this Court took jurisdiction.*

By parity of reasoning pleading as this company did, the Hawaiian decree and statute, "it specially set up or claimed" a right under the treaty, and a Federal question was thereby necessarily injected into the record.

Defendant in error sued in 1895 in the Courts of California upon a policy of life insurance issued in the Hawaiian Islands upon the life of her then husband—H. G. McGrew.

The insurance company defended upon the ground the interest of Mrs. McGrew in the policy had ceased upon the dissolution of the marriage tie, which had been dissolved in 1894 by the final decree of an Hawaiian Court having admitted jurisdiction of both parties.

The answer further shows that the courts of Hawaii subsequently determined in the action of *Carter, administrator*, v. *Mutual Life Insurance Co.*, 10 Hawaiian R., 117 and 570 (the opinions are submitted herewith as an appendix), that the decree referred to did operate upon the interest of Mrs. McGrew in this very policy of insurance and that the administrator of her former husband's estate was entitled to recover upon it. For that reason the company was *compelled* to pay to him the full amount with interest.

The California Court refused to follow the Hawaiian Court in the construction and effect of their own decrees and statutes and decided that Mrs. McGrew *did not* lose her beneficial interest by the divorce proceedings.

Thus the company is to be compelled (unless this Court thinks otherwise) *to pay the same policy twice* by reason of the diametrically opposite views of the courts of the two countries, notwithstanding the treaty.

The effect of this Hawaiian decree and statute upon the property involved was *the only defense* attempted. The answer shows in detail the facts conferring jurisdiction upon the Hawaiian Courts, and *claims* that by that judgment and by the Hawaiian statute, which is set out in *hæc verba*

Mrs. McGrew had ceased to be the owner of the policy. It alleged, "That under and by virtue of the foregoing "provision of law and decree of divorce, all rights of the "said Alphonsine C. McGrew in and to said policy of in- "surance did pass to the said Henri Golden McGrew and "become his absolute property, free and clear of any "claims of the said Alphonsine C. McGrew, plaintiff "herein, whatever."

The findings of the trial court and the admitted statement of facts upon which the case was tried, deal wholly with these Hawaiian judgments and Hawaiian law. And the assignment of errors (fol. 74) has for its contention the following: "The said findings of fact do not determine the issues raised by the following allegation in said answer, 'that under and by virtue of the foregoing provision of law and decree of divorce, all rights of the said Alphonsine McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property, free and clear of any claim of the said Alphonsine McGrew, plaintiff herein, whatsoever.'"

By thus pleading the *final adjudication of the Court of a foreign country*, involving *the operative effect of* a *statute of that country*, the defendant in error necessarily presented to the trial Court a federal question, viz.: a right claimed under a treaty then existing between that foreign country and the United States, and if the decision of the State Court is against that right it is submitted that the federal question is "specially set up or claimed" within the purview of Section 709 Revised Statutes.

For this treaty was "as much a part of the law of every State as its own law and constitution."

Hauenstein v. *Lynham*, 100 U. S., 483.

"All treaties made, or which shall be made, under the "Authority of the United States shall be the Supreme Law

"of the land ; and the Judges in every State shall be bound "thereby, any Thing in the Constitution or Laws of any "State to the Contrary notwithstanding."

Const., Art. VI.

This Court early held in dealing with a right conferred by treaty that,

"In the construction of that section the Court has never required that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a State Court into review before this Court should have been pleaded specially or spread on the record" (Per MARSHALL, C. J.).

Hickie vs. *Starke*, 1 Pet., 97.

It is submitted that this Court has never held that the Federal question must appear in the record by *direct language*. On the contrary :

"The true test is not whether the record exhibits an "express statement that a Federal question was pre- "sented, but whether such a question was decided, and "decided adversely to the Federal right. Everywhere "in our decisions it has been held that we may review the "judgments of a State Court when the determination or "judgment of that Court could not have been given "without deciding upon a right or authority claimed to "exist under the Constitution laws or treaties of the "United States, and deciding against that right. Very "little importance has been attached to the inquiry "whether the Federal question was formally raised. In "*Crowell* v. *Randall* (10 Pet., 368), it was laid down, "after a review of almost all of our previous decisions, "'that it is not necessary the question should appear on "'the record to have been raised, and the decision made "'in direct and positive terms, *in ipsissimis verbis*, but "'that it is sufficient if it appears by clear and neces- "'sary intendment that the question must have been "'raised, and must have been decided, in order to have

"'induced the judgment.' This case was followed by "*Armstrong et al.* v. *The Treasurer of Athens County* "(16 *Id.*, 281), where it was held sufficient to give this "Court jurisdiction if it appear from the record of the "State Court that the Federal question was necessarily "involved in the decision, and that the Court could not "have given the judgment or decree which they passed "without deciding it. See also *Bridge Proprietors* v. "*The Hoboken Company*, 1 Wall., 116, and *Furman* v. "*Nichol*, 8 *Id.*, 44."

Murray v. *Charleston*, 96 U. S., 442.

And a further test was given in

Sayward v. *Denny*, 158 U. S., 184.

"At all events it must appear from the record by clear and necessary intendment that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State courts can be held to have disposed of such Federal question."

To the same effect are

Armstrong v. *Athens Co.*, 16 Pet., 281;
Detroit R. R. Co. v. *Guttard*, 114 U. S., 136;
Eureka Lake Co. v. *Yuba Co.*, 116 U. S., 410.

If this federal question is in the record there is jurisdiction, *although the State Court ignores it in its opinion.*

The decision of the alleged federal question was necessary to the judgment rendered, and hence gives jurisdiction.

Brooks v. *Missouri*, 124 U. S., 400.
Arrowsmith v. *Harmoning*, 118 U. S., 194.

And this rule is followed where a right is set up under the *third* clause of Section 709 as well as under the first and second clauses.

Furman v. *Nichol*, 8 Wall., 44.

Nor was there a *non-federal* ground upon which this decision could be placed broad enough to sustain the Court below notwithstanding error in its ruling in the federal question. For if this treaty did make the foreign law controlling *it was decisive* of the case because plaintiff below was met at the threshold by a defect in title. The property right in the policy had *passed away* by operation of law.

We claim therefore that pleading the Hawaiian decree and statute *forced* upon the trial Court a consideration of this treaty. It could have given no additional weight to the answer to have added after the statement of the decree and statute, "and defendant claims that this decree and law divested plaintiff of her interest by virtue of treaty obligations between the United States and Hawaii." For this was necessarily so

"No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived."

Hilton v. *Guyot*, 159 U. S., 113.

The Hawaiian *decree* of divorce which involved the statute should have been held to have had through comity, and independent of treaty obligations, an authoritative force in California.

But the defendant in the State Court did not rest solely upon the *judgment*, but *ex industria* pleaded also the *statute*.

This was necessary because the judgment in itself makes no mention of the property rights. They were affected by *operation of law* by reason of the decree. And by pleading this law in a California Court its express recognition by treaty became at once a *necessary* question presented for decision.

It has many times been held by this Court that pleading a prior adjudication of a United States Court necessarily raises a federal question on the record sufficient to

authorize a writ of error. For this is a claim under an *authority* exercised under the United States.

Dupasseur v. *Rochereau*, 21 Wall., 130;
Gregory v. *McVeigh*, 23 Wall., 294;
Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 552.

It will be observed that these are "rights" claimed under the third subdivision of Section 709 and that they were not specifically mentioned other than by *pleading the judgment*.

The defendant in error claims that even if the decision of the federal treaty question was necessarily involved in this case, yet that *alone* is not sufficient under the third class of cases in § 709, but it must be "specially set up or claimed."

This point is in a way immaterial in this case, because we have fully shown above that it was "specially set up or claimed," but we think even the statement of the learned counsel is too broad. For in the case of Water Power Co. *vs.* Street Ry. Co., 172 U. S., 488, this Court says: "There is no doubt that under the third class the "federal right, title, privilege or immunity must be, *with* "*possibly some rare exceptions*, specially set up or claimed " to give this Court jurisdiction."

So that there may be exceptions to this rule of specially setting up and claiming. But we have urged that "specially set up or claimed" does not bear the technical limited construction of the moving party.

This Court has laid down the rule, "The record fails to "show, *either expressly or by implication*, that any "'right, title, privilege or immunity,' under the Consti- "tution or laws of the United States, was 'specially set " up or claimed' in either of the Courts below."

French *vs.* Hopkins, 124 U. S., 524.

This claim of the moving party at the most only puts the question back to what constitutes a specially setting up or claiming.

The main claim of the moving party is, that the writ should be dismissed because no federal question was *specially set up or claimed in the trial Court.*

But there is no such narrow holding in this Court. The cases cited by the moving party are either irrelevant, or opposed to any such contention. In Spies *v.* Illinois, 123 U. S., 181 it was, simply said that federal questions could not be raised in this Court "for the first time." Parmalee *v.* Lawrence, 78 U. S., 38, was a case where the certificate of the presiding Judge attempted to *originate* the question. Brooks *v.* Missouri, 124 U. S., 394, was a case where no rehearing was involved, and held, if decision of federal questions was necessary to judgment rendered, it is sufficient to give jurisdiction. Baldwin *vs.* Kansas, 129 U. S., 57 was a case where the State Supreme Court expressly refused to consider the question because it was not raised at the trial. Brown *v.* Massachusetts, 144 N. Y., 579, simply follows the last case. In Oxley Stove Co. *vs.* Butler Co., 166 U. S., 653, there is nothing opposed to our contentions; on the other hand, it favors them as sho n above. Water Co. *vs.* Electric Co., 172 U. S., 488 has been considered elsewhere by us, and is in our favor. In Chopin *vs* Frye 170 U. S., 120, the questions were only raised in the application for the writ of error to this Court.

POINT II.

The federal questions were consequently claimed, as stated in Point I above, in the Supreme Court of California on appeal, and were fully presented by counsel, as shown by the briefs before the latter Court.

All the matter in Point I alleged to have been before the trial Court, including the federal question, was, of course, consequently before the Supreme Court.

The briefs of the Mutual Life presenting the federal question will be found at fol. 174, and the clerk of a Supreme Court of California certifies that such briefs amongst other papers, "is a *true and correct copy of* "*recorders* (*sic*) in S. F. 1230; McGrew *es.* Mutual Life, "consisting of pages one to two hundred and twenty-nine "and same *constitute all papers on writ of error in above* "*entitled cause as shown by the records of my office*" (fol. 231).

These briefs support the position taken in Point I in that they are consistent with the claim there made, and in view of their presence, taken in connection with Point I and Point IV below, how can it be said, to use the test of this Court elsewhere alluded to, that the minds of the State Court was not directed to the Federal question? We are not *depending* on these briefs. We only claim they are consistant with our position.

It is no answer to this for defendant in error to say that they are no part of the record, for although now a copy of the opinion is required to be incorporated in the transcript by the eighth-rule, and this court looks at it for a federal question, yet this Court has said it was no part of the record.

POINT III.

The treaty in question was involved in the decision of the Supreme Court of California and applies to this case.

In the Supreme Court of California, in one of the briefs filed on behalf of the appellant company April 23d, 1898 (p. 75), almost *three* years before the decision of the case by that Court (p. 93), it was contended "that respect for the Hawaiian decree is secured by treaty stipulations, which sometimes smooth the way for the recognition, in doubtful cases, of the effect of foreign judgments upon property rights and interests," and specific reference was made to the protection claimed under the treaty between the United States and Hawaii of 1849 (p. 85).

The claim of the binding effect of the Hawaiian decree and statutes, and the applicability thereto of the terms of the treaty of 1849, was again reiterated in the petition for a rehearing (p. 103), as shown more fully under Point IV below, and was especially assigned in the petition for the writ of error as ground for its allowance (p. 109).

It must be apparent from Points I and II above, and from an inspection of the record, that the decision of the State Courts could not have been reached without the denial of the principal ground of defence pleaded by the defendant, such ground resting upon a right, privilege or immunity set up and claimed under the treaty between the United States and Hawaii. As it is, the judgment of the highest Court of the State, denying any such right, privilege or immunity is subject of review in this Court, and as it appears from the record in this case, that the foreign judgment or decree and the foreign statute were not only specially set up or claimed in the trial Court, but their effect under the terms of the treaty was also elaborately argued before judgment and reiterated

after judgment in the State Supreme Court, it would seem that the defendant company, plaintiff in error here, had done all that could reasonably be required of it to preserve its right to have the federal question, necessarily and so prominently involved in the case, reviewed by this Court.

It is well settled, of course, that the right may be set up in the Trial Court or in the State Supreme Court. "But the record does not show that the company specially "set up or claimed in the State Courts, *or either of them*, "any right under the Constitution of the United States."

Oxley Stave Co. vs. *Butler Co.*, 166 U. S., 658.

This policy was applied for by the insured in Hawaii, where he and his wife remained domiciled at the commencement of the divorce proceedings; there the first premium was paid, and there the policy first went into effect.

Mutual Life v. *Cohen*, 179 U. S., 262.

The defendant in error was served with summons and libel *in Hawaii;* and she appeared in that action and contested it to the end.

The Hawaiian law then in force provided, that in every case when a divorce was decreed "for the adultery of the wife, the husband should hold her personal estate forever."

The Hawaiian Court held, in the action of *Carter* v. *Mutual Life*, *supra* (submitted herewith as an appendix), that by the mandatory character of this statute the personal estate of the defendant was a part *of the subject matter of the suit from its commencement*, and that Mrs. McGrew could not by transferring her domicile to California pending the suit take away anything from the jurisdiction already acquired.

The Supreme Court of California in its opinion held

that the statute of Hawaii did not apply until the divorce decree was rendered, and that inasmuch as Mrs. McGrew was domiciled in California at that time, it did not therefore affect her property rights.

The latter Court quite ignored the proposition that Mrs. McGrew had already appeared in the action for divorce, and that the alienation of the wife's personal estate was, under the Hawaiian law, a *necessary incident* of every action for divorce upon the special ground mentioned.

By Section 709 of the Revised Statutes of the United States, it is provided that:

"A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statue of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties of laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed.

"The Supreme Court may re-affirm, reverse, modify, or affirm the judgment or decree of such State Court, and may, at their discretion, award execution, or remand the

same to the Court from which it was removed by the writ."

It is claimed that the decision of this Court herein is against a right claimed to be conferred by a treaty existing between the United States and the Republic of Hawaii. Of this treaty this Court will take judicial cognizance (Section 1875 C. C. P.); and it is as much a part of the local law of the State of California as its own Constitution (Hauerstein *vs.* Lynham, 100 U. S., 483). This treaty provided:

"If the question should arise among several claimants as to which of them said goods belonged, the same should be decided finally by the laws and judges of the land wherein the said goods are."

The term "goods" here refers to personal property, which in this case was an insurance policy. This policy was applied for and was delivered by the agent of the company in Honolulu; its premiums were paid there, and there it took effect. It was, therefore, so far as the three parties to it, namely: the insured, the beneficiary and the company are conerned, an *Hawaiian contract.*

It was in the possession of Carter when the suit was brought in Hawaii, and surrendered up to the company for cancellation after payment.

That under such conditions the domicile of the insurance company, so far as the policy was concerned, was in Hawaii, is directly decided by the Supreme Court in Mutual Life Insurance Company *vs.* Woodruff, 111 U. S., 138; and that where the first premium is paid and the policy delivered to the insured is the place where the policy takes effect, is also directly decided in Mutual Life Insurance Company *vs.* Cohen, 21 Sup. Court Rep., p. 106.

When the question arises as to the law which is to govern a particular contract, it is frequently necessary to decide that a chose in action has a *situs.* This is always

held to be where the *debtor* resides. The principle that the domicile of the owner controls, is not of universal application, and is never applied when there is an express statutory prohibition to the contrary.

We claim, therefore, that the *situs* of this insurance policy was in Hawaii, and therefore that the courts of that country had the right to finally determine to whom it belonged.

When the divorce action of McGrew *vs.* McGrew was commenced, both parties were domiciled in Hawaii, and Mrs. McGrew was served with process there. She appeared in the action and contested it from its beginning to its end. Her demurrer to the libel having been overruled, she appealed from that opinion directly to the Supreme Court (McGrew *vs.* McGrew, 9 Hawaiian Reports, 475); and another interlocutory order, ordering the guardian to pay counsel fees *pendente lite* was also appealed from (9 Hawaiian Rep., 426).

After these matters were disposed of by the Supreme Court (the practice of that country allowing an appeal to be taken before final judgment), the case was set down for trial. This trial occupied two days' time; witnesses were produced by both parties, and after the decision granting plaintiff a divorce, an appeal was attempted by the defendant to this Supreme Court. It will thus be seen that Mrs. McGrew unqualifiedly submitted herself to the jurisdiction of the Hawaiian Court, not only by appearing t erein, but also by contesting every phase of the litigation.

The effect which these divorce proceedings had upon her personal property rights was thereafter directly brought in issue by the case of Carter, Administrator, *vs.* Mutual Life Insurance Company of New York. This was an action brought upon the same policy of insurance as is now sued upon, and was based entirely upon the proposition that by the divorce the personal property of Mrs.

McGrew had passed to her husband. This was a construction by the Hawaiian Court of its own statute and is a decision by the highest Court of that country that the "goods" here in question were not the property of Mrs. McGrew. By the treaty hereinbefore referred to, this decision of the Hawaiian Court is conclusive, and the decision of this Court being diametrically opposed to the decision of the Hawaiian Court, deprives the defendant company of the right conferred by this treaty. This right as conferred by the treaty, has been claimed by the defendant as shown in Point I above. It was, therefore, embodied in the *record* of the case, because it is apparent that the California Court could not have reached its conclusion without disregarding the judgment of the Hawaiian Court. The Hawaiian Courts decided that this policy of insurance was the property of McGrew's administrator, and the California Court has decided that it was the property of Mrs. McGrew. The conclusion of the latter Court could not have been reached except by holding that the policy was *not* the property of McGrew's administrator.

The first conclusion of law of the trial Court was that this policy of insurance (fol. 11) and the moneys due thereunder never passed to said Henri G. McGrew nor did he ever hold her rights or property in said policy or money.

This is a direct finding and adjudication by the Courts of California, in opposition to the conclusion of the Courts of Hawaii. The finding of the Hawaiian Court was that the rights of plaintiff in and to this policy of insurance did pass to McGrew's administrator.

We must conclude, therefore, that the decision of the California Court is opposed to the decision of the highest Court of Hawaii concerning the title to property which was within the jurisdiction of the Hawaiian Court, all parties to which were properly domiciled there.

POINT IV.

The opinion of the Supreme Court of California expressly referred to the federal question. We regard this point, taken in connection with the others showing that the federal question was specially claimed, as conclusive against the motion to dismiss.

The moving party claims the words "by comity" in the opinion of the Supreme Court show that the latter were not considering a right under the treaty. But it is manifest that just here the Court expressly denied the treaty rights. The Court, referring to the Hawaiian decree, says it was "a decree which could not have been obtained here; "and upon an Hawaiian statute which has no force here "except *by comity*." That is, the Mutual Life was claiming the decree of divorce involved necessarily the application of the statute, and that therefore the decree and statute had force in California by virtue of the treaty, but the Court said no, it has no force by treaty, but by comity.

The plaintiff in error claims that by virtue of certain treaty obligations between the two countries, the Court of California was obliged to follow the decision of the Court of Hawaii, and that the facts presented show the *precise contingency* to which the treaty was intended to apply.

POINT V.

The Federal question was presented the second time to the Supreme Court in the petition for rehearing and denied. and such decision necessarily involved a second consideration of the Federal question by the State Court. The existence of this petition for a rehearing is ignored in the moving papers.

This point is to be considered in connection with the others, and it is not to be disposed of as though we relied upon it *alone*.

In a very recent case of Mallett *vs.* North Carolina, 181 United States Reports, 589, this Court held it was sufficient for the Federal question to be raised in the petition for rehearing provided the State Court considered such Federal question.

In the McGrew case the petition for rehearing raised fully the Federal questions and the Supreme Court of California necessarily considered them in denying such petition, and the Supreme Court of California did not decline to pass upon them.

In the Mallett case this Court, through Mr. Justice SHIRAS, writing the unanimous opinion of the Court, said :

"But we are of opinion that questions arising under "the Constitution and laws of the United States were pre- "sented in the Supreme Court of the State, and were by " that Court considered and decided against the party in- "voking their protection.

"It is true, as we learn from the first opinion filed by "the Supreme Court, that such Federal questions were "not considered by that Court, or, at all events, were not "treated as Federal questions, but as questions arising

"under State laws. But the record discloses that, after "that opinion had been filed but before it had been certi- "fied down, the defendants filed a petition for re-argu- "ment, and presented the Federal questions on which "they rely. The Supreme Court entertained the petition "and proceeded to discuss and decide the Federal ques- "tions. In support of the motion to dismiss, numerous "decisions of this Court are cited to the effect that it is "too late to raise a Federal question by a petition for a "rehearing in the Supreme Court of a State after "that Court has pronounced its final decision (Loeber "*v.* Schroeder, 149 U. S., 580; Sayward *v.* Denny, 158 "U. S., 180; Pim *v.* St. Louis, 165 U. S., 273).

"But those were cases in which the Supreme Court of "the State refused the petition for a rehearing, and "dismissed the petition without passing upon the "Federal questions. In the present case, as already "stated, the Supreme Court of North Carolina did not "refuse to consider the Federal questions raised in the "petition, but disposed of them in an opinion found in "this record (State *v.* Mallett, 125 N. C., 718). Had "that Court declined to pass upon the Federal questions "and dismissed the petition without considering them, "we certainly would not undertake to revise their ac- "tion."

It has thus been held to be sufficient to retain a case upon the docket of this Court if the Federal question was raised for the first time by a petition for rehearing, provided the State Court in denying the petition for rehearing noticed the Federal question and passed upon it.

An inspection of the opinion of the State Court in the Mallett case shows that the discussion of the Federal question raised by the petition for rehearing was embraced in six lines of print and consisted of a terse statement of the point, a denial of its appositiveness and the citation of a single authority in support of the Court's view. The discussion would have been but little less brief had it been confined to the formula "petition denied."

On principle it would seem that the right to maintain

the writ of error in the pending case would be the same. It surely cannot be that the right to relief in this Court is dependent upon whether the Judges of the lower tribunals wield facile or grudging pens. When the litigant has squarely presented the Federal question and its decision is fairly and necessarily involved in the issue, he has done all that can reasonably be required of him and the failure to provoke the State Judges into a discussion of its merits of greater or less length cannot have been intended by this Court as a logical standard by which to measure his right to maintain his writ of error here. Otherwise a hostile State Court could defeat this Court's jurisdiction by simply omitting express reference to the federal question. This Court has repeatedly said it would not tolerate any such attempt.

In the case at bar the judgments of the State Courts against the company could only have been reached as the result of the denial of the effect claimed for the Hawaiian judgment and statutes under the treaty. As it is the law of the land that Courts shall first hear and then upon consideration determine, it must be presumed that the company's defense was carefully though erroneously weighed, and no discussion of it by the State Court, however elaborate, could have disposed of it more effectually than the words "motion denied."

Thus in Chapman *v.* Goodnow, 123 U. S. 548 this Court says:

"*We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of*

the Revised Statutes, as if it had been specifically referred to and the right directly refused."

It cannot be said that in this case the State Court declined to pass upon the Federal question distinctly raised by plaintiff in error both before judgment and in the petition for rehearing without considering them, for it was necessary for the State Courts to have considered such questions if it considered the case at all.

The question involved in this case is of novel importance. It is whether under our system of jurisprudence a party can be required by decrees of competent courts to pay to two different individuals money which he has agreed to pay to either one, but not to both.

The insurance company, the plaintiff in error, has already discharged the full measure of its obligation upon the policy in question, as the result of the decree of one court of competent jurisdiction. It remains for this court to say whether it shall again be required to pay the amount called for by the policy because the California courts, ignoring its pleas in bar and rejecting evidence offered in support thereof, has so decreed.

The federal question is clearly and distinctly presented by the record and the merits of the cause should not be decided by the Court until full opportunity has first been afforded for their discussion.

POINT VI.

The defendant in error erroneously attempts on this motion to bring before this Court prematurely the construction and effect of the Treaty. It is sufficient here to point out the general feature of the questions which will come before this Court when the merits are reached, in addition to what has been said in the preceding points. The plaintiff in error is not called upon to fully present its views on the merits, nor does it pretend to do so.

(*a.*) The claim of the moving party that the treaty does not apply because there is no showing of the citizenship of the parties is wholly untenable.

1st. Regarding the question as one arising among several claimants in the divorce case, it is apparent on the defendants' in error own showing, that the question arose between Henri G. McGrew, a citizen and subject of Hawaii, and Alphonsine McGrew, a citizen or subject of California.

The claim of the Company is that the divorce suit itself involved the ownership of the policy, and, if as the defendant in error here pretends she was a citizen of California at the time the decree was entered, the question of the divorce and the incidental question of ownership of property arose between a citizen or subject of the contracting parties to the treaty.

The moving party claims that the record shows only that Henri G. McGrew was a resident of Honolulu, and that the defendant in error at the date of the divorce was a resident of California. These parties were then, in an

international sense, citizens or subjects of each country. As a matter of fact the record clearly shows that the McGrews were both *domiciled* in Honolulu.

"In the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country and enjoying the protection of its sovereign, is deemed a subject of that country,"

The Pizarro, 2 Wheaton, 91.
The Freundschaft, 3 Wheaton, 154.
The Venus, 8 Cranch, 252.
U. S. *v.* Chong Sam, 47 Fed. Rep., 878.

The law will presume all persons domiciled in a country to be citizens of that country.

State *v.* Blackmo, 6 Black (Ind.), 489,

and therefore, plaintiff in error having shown the domicile of the parties, cast the burden of proving they were not citizens upon the other side.

This principle is shown by the recognition of domicile as the test of that citizenship necessary to confer jurisdiction upon the Federal Courts, since State citizenship follows domicile by operation of law.

Case *v.* Clark, 5 Mason, 70.
Popenheim *v.* India Rubber Co., 14 Fed. Rep., 707.
Burnham *v.* Rangley, 4 Fed. Rep., 775.

2d. Regarding the question as one arising among several claimants in the suit by Carter, as administrator of Henri G. McGrew therein against The Mutual Life, the question arose between the administrator of Henri G. McGrew, a citizen or subject of Hawaii, and The Mutual Life, a citizen of the United States, as to whether the policy be-

longed to the estate of Henri G. McGrew or Alphonsine McGrew.

(*b.*) It is claimed by defendant in error that the term "goods" as used in the treaty does not cover a *chose in action*, but refers only to *tangible* personal property.

As a matter of fact, the "goods" were in Hawaii when the action for divorce and the action against the Mutual Life there were begun.

The word "goods" in the treaty is a word frequently employed in treaties, and is a translation of the word "biens" used in the French version of treaties. This word "biens" includes *all* personal property.

The particular words in the treaty are used as synonymous with *personal estate*, as a reference to preceding paragraphs will show: "They shall be entitled to dispose of their personal property of every kind and description, by sale, gift, exchange, will or in any other way whatever, without the smallest hindrance or obstacle, and their heirs or representatives being subjects of citizens of the other contracting party shall succeed to their *personal goods*, whether by testament, or *ab intesto*, and may take possession thereof either by themselves or by others acting for them and dispose of the same at law, paying to the respective governments such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases."

The term "personal goods," which the treaty deals with, must reasonably be presumed to include all of one's personal estate, because it could not be intended to exclude the right of disposing of or succeeding to intangible property such as choses in action, stocks, bonds, etc. For this would exclude by far the greater portion of the property of the individual, and it is a general rule in the construc-

tion of treaties that a liberal construction of the rights to be claimed under it should be followed.

Sharks v. *Dupont*, 3 Pet., 242 ;
Hauenshein v. *Lynham*, 100 U. S., 242.

The particular paragraph in question then proceeds, " And if a question should arise among several claimants as to which of them *said* goods belong, the same shall be decided finally by the laws and judges of the land wherein the *said* goods are."

Thus the word " said " being referred to, its proper antecedent shows that it was the intention of the contracting parties to include by the term " personal goods " all the personal estate of the individual.

This view is strengthened by the fact that the treaty then proceeds to pass upon rights in *real property* it being the evident purpose to provide for rights in *all* property, personal and real.

The term " goods " is by no means limited to movables which have an intrinsic value, and in many cases it has been held to include choses in action and other intangible interests.

Dowdell v. *Hamm*, 42 Pa. St., 61,

where the Court said :

" The word 'goods' is *nonen generalissimum*, and when construed in the abstract the term will embrace all the personal estate of the testator, bonds, notes, money, plate, furniture, etc."

Tisdale v. *Harris*, 20 Pickering, 9 ;
Greenwood v. *Law*, 25 At. Rep., 134,
Terhune v. *Bray's Ex.*, 16 N. J. Law, 53.

No good reason is suggested which would hold that this treaty intended to secure the title to tangible personal estate, but to no other personal property, and, therefore,

the word "goods," taken in its general sense, would include this insurance policy.

(*c*) The moving party claims that no question has arisen among the several claimants as to which of them said goods belonged. We have already averted to this under "*a*" above, in which it is indicated that the question arose in the divorce case and also in the case on the policy in Hawaii.

But this is practically conceded by the moving party, because in their Point III on page 14 of the motion to dismiss, they claim that if there has been any determination of a controversy as to the ownership of this policy between several claimants, then it has been done by the California judgment. The California case was between Alphonsine McGrew and The Mutual Life. If the moving party concedes therefore that a question between claimants arose in the California case, they must necessarily concede that it arose in the Hawaiian case by the Administrator of McGrew against the Company.

(*d*) It is lastly urged by the defendant in error that, by the judgment of the California Courts, the ownership of the policy has been "finally decided by the laws and Judges of the land wherein the said goods are."

This involves the whole question on the merits. It is not concerned with the technical question raised on the motion to dismiss for want of a Federal question appearing in the record, but assumes that this Court *having taken jurisdiction* nevertheless judgment should be affirmed.

For the purposes of this motion it is not necessary to decide whether this insurance policy could have a *situs* independent of the domicile of its owner, for that owner, and in fact all others interested in the transaction, *were admittedly domiciled in Hawaii at the time the*

divorce proceedings were commenced. And therefore whether the law of the domicile of the owner or the law where the insurance was negotiated controls, is quite immaterial, because they *both are the same.*

To decide this question, therefore, the Court must pass upon the main issue, viz,—did the property right in this insurance policy form a part of the subject matter of the divorce action? If it did, it is obvious that the Judges and laws of Hawaii should control, for they first acquired jurisdiction.

We deem it proper to merely outline our position on this question.

If the alienation of the wife's personal estate was a *necessary incident* of the divorce decree, it must follow that Mrs. McGrew could not by removing to California deprive the Court of the jurisdiction already acquired.

If by reason of the mandatory character of the statute, no divorce in Hawaii for the special ground named could possibly be had without the alienation of the wife's personal estate, and if this effect must follow as a matter of law, any attempt of the Court to rule otherwise would have been nugatory, for the desired results were produced by the law and not by the words entered in the decree.

Bamford v. *Id.*, 4 Oregon, 30.
Bishop on Marriage and Divorce, Sec. 1521.
Story on Conflict of Law, Sec. 230–b.

That therefore the change of domicile of Mrs. McGrew pending the litigation is an immaterial factor for if she *had remained in Hawaii* her property right would not have been affected if it was not already involved in the divorce proceedings.

Conclusion.

We therefore respectfully submit that this motion should be denied, and that a consideration of the matters referred to in the motion which affect the merits of the case should be postponed until the regular hearing of the cause, when the same can be fully and orally presented to this Court and on these grounds:

(1.) The Federal question was before the State Courts and was ruled against the plaintiff in error.

(2.) Whether the Hawaiin judgment was binding under the decisions of this Court or under the treaty in question, and what was the effect of the change of domicile of Mrs. McGrew pending the divorce action, are questions going to the merits of the case and should not be finally ruled against the plaintiff in error on this motion.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERIC D. MCKENNEY,
W. H. CHICKERING,
WARREN GREGORY,
Of Counsel.

No. 336. 109

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JAMES H. McKENNEY, Clerk.

Supreme Court of the United States,

Supp. to Br. for P. in Error

OCTOBER TERM, 1901.

No. 336.

Filed Nov. 5, 1901.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX TO BRIEF OF PLAINTIFF IN ERROR CONTAINING OPINIONS OF HAWAIIAN COURT IN CASE OF CARTER ADMINISTRATOR OF McGREW, DECEASED, VS. THE MUTUAL LIFE INS. CO., ESTABLISHING TITLE TO INSURANCE POLICY IN SUCH ADMINISTRATOR.

APPENDIX.

JOSEPH O. CARTER, Administrator of the Estate of HENRI G. MCGREW, deceased,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

These opinions are reported in 10 Hawaiian Reports, 117, 570.

QUESTIONS RESERVED BY CIRCUIT COURT, FIRST CIRCUIT.

Submitted July 12, 1895. Decided August 15, 1895.

JUDD, C. J., FREAR, J., and Mr. CECIL BROWN of the Bar, in place BICKERTON, J., absent from illness.

A policy of insurance was issued to M, payable upon his death to "A, wife of M, if living; if not living, to his executors, administrators or assigns." M afterwards obtained in the Circuit Court a decree of divorce from A for her adultery. A took exceptions to the decree, but did not get them certified to the Supreme Court. M subsequently died. Held:

(1.) In an action at law by the administrator of M's estate on the policy A need not be made a party.

(2.) The decree of divorce was absolute and is still in effect.

(3.) Exceptions to the decree granting the divorce, so far as property rights were involved, might have been taken to and argued and determined in the Supreme Court, notwithstanding the death of the libellant.

(4.) The insurance, so far as the construction of the policy is concerned, is payable to A, notwithstanding the fact that she was not M's wife at the time of his death ; but,

(5.) By Civ. Code, Sec. 1331, A's interest in the policy passed upon the divorce to M to the administrator of whose estate the insurance is now payable.

Opinion of the Court by Frear, J.

This is an action on a policy of insurance issued by the defendant company upon the life of Henri McGrew for $5,000 payable upon his death to "Alphonsine McGrew, wife of Henri G. McGrew, * * * * * if living ; if not living, to his executors, administrators or assigns." The company stands ready to pay the money, but desires that it be first judicially determined who is entitled to it—whether Alphonsine McGrew or the administrator of the insured. The doubt upon this point is occasioned by the fact that the insured, prior to his decease, obtained a decree of divorce from his wife on the ground of adultery, the validity and effect of which decree are questioned.

The contract of insurance was entered into in the Hawaiian Islands ; the policy is dated September 14, 1892, it was issued to Henri G. McGrew, upon his application ; he retained possession of it and paid all premiums upon it ; he died October 22, 1894 ; at the time of entering into the contract and until his death he was a subject and resident of and domiciled in these islands ; J. O. Carter is the duly appointed administrator of his estate ; all conditions and requirements necessary to be performed or complied with by the decedent or plaintiff have been performed and complied with.

The case was tried in the Circuit Court, First Circuit, jury waived, upon agreed facts, and comes here with

the following questions reserved by the Circuit Court on motion of both parties:

1. Is Alphonsine McGrew a necessary party to this case?

2. Were H. G. McGrew and Alphonsine McGrew divorced; and if so, is the decree of divorce still in effect?

3. Is the amount due on Henry G. McGrew's insurance payable to J. O. Carter, administrator of the estate of H. G. McGrew?

First, this is not a suit in equity, as by bill of interpleader, but an action at law, and therefore, obviously not only is it unnecessary, but it would be improper, to make Alphonsine McGrew a party. This is practically conceded by the defendant.

Secondly, it appears by the agreed statement of facts, including the record in the divorce case, which is made a part of the agreed statement, that on the 24th of August, 1894, an absolute decree of divorce from the bonds of matrimony was decreed by the Circuit Court, First Circuit, of the Hawaiian Islands, in favor of Henri G. McGrew against his wife, Alphonsine McGrew, for adultery on her part; that on the 27th of the same month it was stipulated that it should not be incumbent upon libelee's counsel to present his bill of exceptions until one week after he had been furnished with a transcript of the evidence; that on the 24th of September following he was furnished with such transcript; that on the 1st of October following he filed a paper purporting to be a bill of exceptions; that on the next day libellant's counsel moved the Supreme Court to set the cause for hearing on the alleged bill of exceptions, but that libellee's counsel objected on the ground that the bill had not been signed or allowed by the Circuit Court, and that the motion was denied on that ground;

that Henri G. McGrew died on the 22d of the same month; and that no bill of exceptions was ever allowed by the Circuit Court.

The statute (Comp. L., p. 437) provides that in matters of divorce, "Any party aggrieved by any order or decision of the Circuit Court, may except thereto, and his exceptions shall be duly noted, and certified to the Supreme Court, and no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the Supreme Court, sitting in banco, and if the Court in banco shall be of opinion that the order or decision excepted to in said Circuit Court was erroneous, they shall so certify, and thereupon the case shall be heard anew."

It argued in the first place that the decree of divorce never became absolute because the alleged exceptions were never argued and determined in the Supreme Court.

The practice here in divorce as in other law cases has usually been to enter at once in the Circuit Court an absolute decree or judgment, which is subject to be set aside by the Supreme Court on exceptions. This is what is meant by the provisions of the statute that "no order or decree for a divorce shall be made absolute until such exceptions have been disposed of." An absolute decree is made at once, but, if excepted to, it may be set aside by the Supreme Court. If not excepted to, it is and remains absolute. This has been the construction placed upon the statute in practice and is in harmony with the more general provisions and the practice thereunder, relating to exceptions in all law cases (Laws of 1892, Ch. 57, Secs. 72–78). The "exceptions" referred to in the statute are "exceptions allowed" or "certified to the Supreme Court." If they

were merely exceptions alleged to have been made by counsel, whether allowed or certified or not by the Court, and if no absolute decree could be made until such exceptions were argued and determined in the Supreme Court it would be in the power of the party against whom a decree of divorce has been made to forever prevent the decree from becoming absolute by merely filing alleged exceptions, perhaps wholly "unconformable to truth," and never following them up, or attempting to have them allowed or certified, but on the contrary resisting all endeavors on the part of the opposite party to have them disposed of. In this case it appears that no exceptions have ever been allowed or certified to the Supreme Court, and from all the circumstances, it would seem that the libelee had abandoned her intention, if she ever had any, of getting any exceptions allowed if she could, and having them argued and determined in the Supreme Court.

But it is further argued that the divorce case was abated by the death of Henri G. McGrew, and that even if the libelee had desired to take further action on her alleged exceptions she could not have done so. It seems to us that if the libelee had not for other reasons lost her right to take the case to the Supreme Court on exceptions, she might have done so even after the death of the libellant. Such seems to be the current of authority as to decrees granting divorces in so far as property rights are involved. See Shafer *v.* Shafer, 30 Mich., 163; Downer *v.* Howard, 44 Wis., 82; Wren *v.* Moss, 7 Ill., 72; Danforth *v.* Danforth, 111 Ill., 236; Thomas *v.* Thomas, 57 Md., 504, referred to in 5 Am. & Eng. Enc. 773, Wilson *v.* Wilson, 73 Mich., 620; Barney *v.* Barney, 14 Ia., 189; Kimball *v.* Kimball, 44 N. H., 122.

Thirdly, assuming, then, that the parties were divorced, who is entitled to the insurance? It is argued that since it is payable to "Alphonsine McGrew,

wife of Henri McGrew," payment to her is conditioned upon her being his wife at the time of his death, and that since a divorce had taken place she was not then his wife. No such condition can fairly be implied from the words of the policy. The insurance is payable to the person named, "Alphonsine McGrew," and the only condition annexed to the payment to her is that she shall be living at the time of the death of the insured. The words are, "if living." The words "wife of Henri G. McGrew" are words merely of description, not of condition. What provision the insured might have made, had he contemplated the possibility of a divorce is not for us to say or to give effect to. The policy must be construed as it is. That the word "wife" as here used is mere descriptive, and that the insurable interest of the beneficiary need not continue, or that there need not even be an insurable interest in the first place, the insurance having been effected by the insured and not by the beneficiary (see Conn., &c., Co. *vs.* Schaefer, 94 U. S., 457; Vivar *vs.* Knights of Pythias, 52 N. J. Eq., 455; McKee *vs.* The Phœnix, &c., Co., 28 Mo., 383; Overbeck *vs.* Overbeck, 155 Pa. St., 5.

But it is provided by statute (Civil Code, Sect. 1331) that "when a divorce is decreed for the adultery or other offence amounting thereto, of the wife, the husband shall hold her personal estate forever." By this statute, the interest of Alphonsine McGrew under this policy passed upon the divorce to her husband, and the insurance is now payable to the administrator of his estate. The policy and her interest under it were personal estate, and, the contract having been entered into in these islands, the divorce having been granted here, and the parties having been domiciled here, the beneficiary must be determined by the laws of these islands.

The first question reserved must be answered in the negative, the other two questions in the affirmative, and the case is remanded to the Circuit Court for such further proceedings as may be proper.

CARTER & KINNEY for Plaintiff.
W. R. CASTLE for Defendant.

J. O. CARTER, Administrator of the Estate of H. G. McGrew, deceased,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

MOTION OF REHEARING

Submitted March 11, 1896.
Decided December 19, 1896.

JUDD, C. J., FREAR, J., and CECIL BROWN, Esq., of the Bar, in place of WHITING, J., disqualified.

The question of the effect of a divorce upon the ownership of a policy of life insurance, or the right to the proceeds thereof, is not a question of the construction of the policy.

The provision in an application for life insurance that it is made "subject to the charter of the company and the laws of the State of New York," is not an agreement that the question of the effect of a foreign divorce upon the ownership of the policy or the proceeds thereof shall be determined by the statutory law of New York.

By private international law the effect of such divorce should be determined by the law of the place of domicil and divorce.

A rehearing will not be granted for argument by new counsel upon a question raised at the first hearing, but which former counsel chose not to argue, at least if it does not appear that a new argument would probably lead to a different result.

A rehearing will not be granted in order to allow argument upon a question of the constitutionality of a

statute, even though that question was not argued at the first hearing, where the unconstitutionality of the statute was not made a ground of the motion for a rehearing and it does not appear that an argument upon the question would prbably lead to a reversal of the decision.

Where a Court has acquired jurisdiction in divorce proceedings over both parties at the place of their domicil and afterwards decrees a divorce, the effect of the divorce upon the disposition of the personal estate of the wife will not be affected by a change of residence of the wife previous to the signing of the decree.

Opinion of the Court by Frear, J.

The former decision, *ante*, p. 117, in this case was filed August 15, 1895. On October 4, 1895, new counsel for the defendant filed a motion for a rehearing, based on a number of grounds therein set forth. On March 6, 1896, he filed additional grounds. Opposing counsel objected to the Court's entertaining the motion on the grounds of defendant's laches in filing the same and its acquiescence in the judgment. Affidavits were filed on both sides. The Court thought it best to hear argument upon the motion itself as well as upon the preliminary question of laches and acquiescence, and now, in view of all the circumstances and of our conclusion, we believe it will be more satisfactory to consider the motion entirely upon its merits, without going into the question of laches and acquiescence at all.

The points relied upon by the defendant's counsel in his able and elaborate brief will be considered in their order. We regretted much at the first hearing that we were not thus favored with full argument on behalf of the defendant, except upon one of the many interesting questions involved in the case and at that time argued by plaintiff's counsel or suggested by the Court. The

decision was rendered at an early date, as requested on behalf of the defendant, in such light as the Court then had, and yet in the light of the full argument now presented, we do not find sufficient ground for allowing a rehearing. We come to this conclusion fully realizing both that if a rehearing should be granted, it would by no means imply that the former decision was erroneous, and that the merits of the case are not involved in the disposal of the motion, although, as found by counsel in argument, the merits must necessarily be considered to some extent.

The first point relied on is, that the Court manifestly erred in construing the policy as an Hawaiian contract, whereas, it appears upon its face to be a New York contract. The case was submitted upon an agreed statement of facts in which it was expressly agreed that the "contract of insurance was made and entered into in the Hawaiin Islands." This is all that was assumed in the decision, namely, in the words, "the contract having been entered into in these islands." But it is argued that the agreed statement cannot be construed as an admission that the policy was an Hawaiian contract. If so, the decision also cannot be construed as holding that, for its language is that of the agreed statement.

It is further argued that, if the agreed statement does contain such admission, then counsel, who signed it, exceeded his authority in so doing and the defendant is not bound thereby. If the statement did contain such admission, the Court would have been perfectly justified in acting upon it. When a case is submitted to the Court upon an agreed statement of facts signed by responsible counsel, it certainly would not be the duty of the Court, it would not be proper to assume that counsel was acting without authority and then decide the case upon the facts directly contrary to those upon which the case was submitted, and especially where as

in this case the admission if made, might under certain circumstances be in accordance with the facts notwithstanding the particular language of the policy or other documents before the Court. But it is unnecessary to decide whether the agreed statement did contain such admission, or if it did, whether an attorney at law could as such properly make such an admission, or if not, whether such admission, if made, was in fact authorized or acquiesced in by the defendant itself. For the Court did not as matter of fact construe the policy as a Hawaiian contract. It construed it precisely as requested by defendant's counsel (holding that the word "wife" in the policy was a word of description, not of condition) in accordance with the judicial decisions elsewhere in similar cases, which so far as appears would be followed in New York as well as in Hawaii. Not a single New York decision or statute was then cited upon this point by counsel on either side, but it was assumed by the Court and by counsel on both sides that the law upon this question was the same in New York as elsewhere, and the view taken by the Court as to what that law is, is conceded by defendant's present counsel to be correct. It is true the Court spoke of the contract as "entered into in these islands," but even if those words should be construed as holding that the policy was a Hawiian contract (a construction which defendant's counsel argues cannot be placed upon similar words in the agreed statement) still the words were inserted in the decision merely for what they were worth. They were not then and are not now regarded by the Court as of much importance. The facts of importance, stated in the same sentence, were that the divorce was granted and the parties were domiciled here. Even these facts were not alluded to as having

any bearing upon the question of the construction of the policy. The Court had finished its comment upon that question and was then upon the question of ownership. And this seems to be the source of misunderstanding in this case. Construction is confused with ownership. If A had possession of certain personal property under a contract it might be a question of the construction of the contract whether A's interest was in his own right, and if so, what that interest was, or, if A had died, it might be a question of construction whether the property should then pass to A's representatives or to some one else. These questions would be decided by the law of the place of contract. But suppose the contract were construed as having passed the property absolutely to A and his representatives, the further question who were the representatives would be one, not of construction, but of distribution, to be solved by the law of the place, not of the contract, but of A's domicil. Or, suppose A had previously assigned the property, his representatives would not take it all—not because of an erroneous construction of the contract by the law of domicil, or any other law, but because the ownership of the property had changed—a question which might necessarily be determined by some other law, as the law of the place of assignment, if that were a different place. So, if A had become bankrupt and the property had become assigned by operation of law to his assignee in bankruptcy. So, if A had married and the property had passed by law to her husband, so, as in this case, if a divorce had been obtained against her, and the property had thereupon passed to her husband by operation of law. To allow an assignee of a contract to recover, is not to vary the terms of the original contract, but to enforce the terms of the contract of assignment.

It is further argued, that, if the mere fact that the policy is a New York contract is not sufficient to require the New York law to govern in determining the question of assignment by operation of law, as distinguished from the question of construction, yet it is expressly provided in the policy that the New York law should govern and it was competent for the parties to so agree. Let us assume that such an agreement, if made, would have been valid. The provision referred to is not in the policy proper, a copy of which was before the Court, but in the application, which, although in terms made a part of the policy, was not before the Court and has not to this day been seen by the Court. This provision is stated in the brief as follows: "This application is made to the Mutual Life Insurance Co. of New York, subject to the Charter of the Company and the laws of the State of New York." An application which the parties themselves did not make a part of the case and which the Court had never had an opportunity of seeing, could not be considered. Even if it had been a part of the case, the Court would still have been in the dark as to the provisions of "the Charter of the Company and the laws of the State of New York," no proof of which was made. In the present counsel's brief, to be sure, reference is made to an old New York statute differing slightly from our own former statute upon the subject under consideration, but no such reference was made at the first hearing, and if it had been made, would it have been sufficient proof of what the New York law is at present, and might not the charter have contained some other provision, for, if the parties may have agreed that the property in the policy should pass in a manner different from that prescribed by Hawaiian law, may they not also have agreed similarly as to New York law? But, aside from all this, we do not see how an agree-

ment that the application is made subject to the charter of the company and the laws of the State of New York, can be construed as an agreement that the ownership of the policy itself after it has issued or the right to the proceeds thereof should be determined by that charter or those laws. Not merely because the application is not the policy, though part of it, for even if the policy itself had been issued expressly subject to the same charter and laws (and it probably was issued subject thereto whether expressly so stated or not) this could not mean that the New York statutory law should govern every question that might subsequently arise in relation to the policy—its ownership, the court in which or the procedure by which it should be enforced, the persons who would be the insured representatives in case he survived his wife, &c. Indeed, New York law must be assumed to include provate international law, by which the effect of a divorce upon the ownership of personal property is determined by the law of the place of divorce at least if that is also the place of domicil—the New York statute upon the subject so far as it relates to personal property being presumed to apply only to divorces granted in that state. In considering this question, should be borne in mind that the specific provision in the policy relating to assignment is not involved.

The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern whether the action is brought in Hawaii, California or New York. In our opinion that law is the law of the place of domicil and

divorce. We can only assume that the Clifornia Court will take the same view.

The next point relied on is that, if Hawaiian law, that is, the law of the place of domicil and divorce, is to govern, that law did not pass the policy in question to the husband. The statute (Civ. Code, Sec. 1331), provided that "When a divorce is decreed for the adultery * * * of the wife, the husband shall hold her personal estate forever. * * *" The argument is that, as the Court has held that the former statute (Civ. Code, Sec. 1286), upon the rights of husband and wife, which made the husband "the virtual owner" of the "Movable property" of his wife, was substantially an enactment of the common law upon the subject and therefore did not pass the wife's choses in action to the husband until reduced to possession by him, so it must by analogy hold that under the statute now in question the wife's choses in action did not pass to the husband under the description of "personal estate" until reduced to possession and that as the husband did not in this case reduce the policy in question to possession during his lifetime the wife was entitled to it. The question whether the policy was "personal estate" within the meaning of the statute was argued by counsel for the plaintiff at the former hearing, and was considered and decided by the Court, though this particular phase of the argument was not gone into. A rehearing should not be granted merely to allow new counsel for the defendant to present argument upon a question raised at the first hearing, but which former counsel for the defendant then chose not to argue, at least where, as we believe to be the case here, a rehearing would probably not result in a different decision. For, even if it could be assumed from the facts agreed upon that the husband had not reduced the policy to possession during his lifetime, still the

statute in question could not, like the other statute referred to, be presumed to have been intended to be an enactment of the common law, so as to be subject to the alleged exception relating to choses in action, for the common law upon this subject was totally different; it did not allow the husband to reduce to possession his wife's choses in action after divorce at all; after divorce he is no longer husband; his right to the wife's choses in action then is not a marital right; marital rights no longer exist; the right is one of property under the statute. The words "personal estate" used in the statute naturally include all personal estate whether in action or possession.

The next point relied on is that the statute in question (Section 1331) was repealed by implication by the Married Woman's Act of 1888. This point was considered by the Court before rendering its decision, and, if we remember rightly, was also suggested to counsel at the hearing, but was not touched upon in the decision because counsel had not cared to argue it. Very probably the legislature which passed the Act of 1889 emancipating married women from the harsh provisions of the common law would have also repealed the section in question, if it had been brought to its notice. But this is only a matter of probability as to what would have been done. It was not in fact done. The section is not inconsistent with that Act. It may be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery. We are glad to note that the section has since been repealed by an Act introduced by Senator Brown, who, as substitute judge took part in the former decision and now takes part in this.

The point made in the brief that Section 1331 is unconstitutional was not made a ground in the motion for

rehearing. We need only add that we fail to see the force of the learned argument upon this point.

The next point is, that Section 1331 did not apply to the property in question, because at the time of the divorce neither the wife nor the policy were in this country or within the jurisdiction of the Court—the wife because she had gone to California, the policy because, although it remained here in the possession of the husband, being personal property it followed its owner, the wife, in contemplation of law. We presume that by this is meant, not that personal property follows its owner wherever the latter may happen to go temporarily, but that it is governed by the law of the owner's domicil, or residence *animo manendi*. Now there was no proof whatever that the wife in this case intended to change her domicil, which had previously been here, and which in the absence of proof to the contrary would, at least after so short an absence, be presumed to continue here, to say nothing of the rule that the wife's domicil is that of her husband, except under certain special circumstances. But however that may be, both parties were undoubtedly domiciled here when the divorce proceedings were commenced, and when the Court acquired jurisdiction over them, and that was sufficient so far as the question of domicil was concerned. The Court having acquired jurisdiction under these circumstances, the incidents of the divorce would follow according to the law of the place of divorce.

Finally, it is argued that the divorce had not become absolute because the exceptions taken in the divorce proceedings had not been disposed of (Comp. L., p. 437). The construction of this statute was argued and decided

at the first hearing, and we are practically asked to go over the same ground again. The only criticism made upon the former decision of this question is based upon a misconstruction of that decision.

The motion for a rehearing is denied.

W. A. KINNEY, for plaintiff.

L. A. THURSTON, for defendant.

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Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERICK D. McKENNEY,
WILLIAM H. CHICKERING,
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Of Counsel.

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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff-in-Error,

against

ALPHONSINE McGREW,
Defendant-in-Error.

BRIEF IN BEHALF OF THE PLAINTIFF-IN-ERROR.

I.

Preliminary Statement.

This is an action begun in the State Court of California on a life insurance policy issued by the plaintiff in error in Hawaii to Henri G. McGrew, now deceased. The action was brought by Alphonsine McGrew, formerly the wife of Henri, as the beneficiary named in said policy, notwithstanding that in the lifetime of Henri he had divorced her because of her infidelities, and that under the Hawaiian law the divorced wife's personal estate including choses in action such as her inchoate contingent interest in this policy had passed to and become vested in him.

After the death of Henri, the plaintiff in error fully discharged its obligation under the policy now in suit

by paying the full amount thereof together with interest and costs to J. O. Carter, administrator of Henri, who had brought suit and recovered judgment thereon in the Courts of Hawaii for the benefit of the infant son of Henri.

The policy was at all times in Hawaii, and the laws and judges of Hawaii finally decided that the policy belonged to Henri G. McGrew and the estate of Henri G. McGrew, the deceased, in two actions in Hawaii, the first being a divorce action between Henri G. McGrew and Alphonsine McGrew, the second being the suit of Carter, Administrator, *vs.* this Company. The plaintiff in error claims that the legal proceedings in Hawaii, and the payment of the judgment there by it, gave it immunity under the Hawaiian treaty of 1857, and the Faith and Credit Clause of the Constitution of the United States, Art. IV, Sec. I, from being made to pay a second time in California in this suit. The practical result would be that such payment would be for the benefit of the mother when it has already paid for the benefit of the infant son living with her. The Supreme Court of California held otherwise, and writ of error is brought to this Court.

II.

A Chronological Statement of Facts and Proceedings in the Hawaiian and California Courts.

1890, Henri G. McGrew and his wife, Alphonsine McGrew, were domiciled at Honolulu, in the Kingdom of Hawaii.

1892, Sep. 13th. Policy for $5,000 issued by The Mutual

Life Insurance Company of New York upon the life of Henri G. McGrew, the proceeds of said policy being payable "unto Alphonsine McGrew, wife of Henri G. McGrew, in Honolulu, in the County of Oahu, in the said Hawaiian Islands, if living, and if not living, to *his* executors, administrators or assigns."

It is to be noted that Mrs. McGrew's interest was purely contingent on her surviving McGrew.

1894, Feb. 8th. Prior to this date, one Charles L. Carter of Hawaii was duly appointed guardian of the person and property of Henri G. McGrew, then a person *non compos mentis*.

1894, Feb. 8th. Carter, as guardian, filed in the Courts of Hawaii libel, praying for a divorce from said Alphonsine McGrew on account of the adultery of the said Alphonsine, the bill charging her with various acts of adultery in Honolulu and San Francisco at divers times during two years (10 Hawaiian Rep., 481).

1894, Feb. 9th. On this date Carter, Henri G. McGrew and Alphonsine, were domiciled in Hawaii, and personal service was then made on Alphonsine McGrew of process in the divorce action (Record, 29).

The prayer of this libel is, that Alphonsine might be summoned to appear and answer the complaint, and that Henri might be divorced from the bonds of matrimony from the said Alphonsine and that the custody of the child might be awarded to him (Rec. 30).

At the time the divorce suit was commenced in Hawaii and at the time the divorce was granted, the following statute was in force in Hawaii:

> "*When a divorce is decreed* for the adultery, or other offense amounting thereto, of the wife, the husband *shall hold* her personal estate forever, and he shall hold her real estate so long as they shall live, and if he shall survive her, and there shall be issue to the marriage born alive, he shall hold her real

estate for the term of his own life, as a tenant by courtesy; provided that the Court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her as it may deem proper" (Civil Code, Sec. 1331).

1894, Feb. 21st. Alphonsine McGrew, sometimes known as Sinette McGrew, asks for alimony.

1894, April 5th. Alphonsine leaves Hawaii for California with their minor son, *and at this time her interest in the policy was purely contingent.*

1894, April 11th. Alphonsine demurs to the libel.

1894, Aug. 6th. Demurrer overruled.

1894, Aug. 10th. Alphonsine filed an answer in the divorce case denying the allegations, and it is to be noted that this answer was filed subsequent to her removal to California.

1894, Aug. 24th. Decree of divorce entered as follows:

"It is ordered, decreed, adjudged, and considered by the Court here, that the said libellant, Henri G. McGrew, be, and hereby is, divorced from the bond of matrimony heretofore formed and entered into between him, the said Henri G. McGrew, and her, the said Alphonsine McGrew" (Record, fol. 37).

Alphonsine was then in California, but appealed and continued to fight decree up to January, 1897, when she finally failed (see Record, pp. 10, 24).

This decree changed the title to the policy.

1894, Oct. 22nd. Henri G. McGrew died at Honolulu, never having changed his domicil from Hawaii (Record, page 85).

The Carter Suit in Hawaii.

After the death of Henri G. McGrew, J. O. Carter, the administrator of the estate of Henri G. McGrew appointed in Hawaii, commenced an action in the Courts of Hawaii against The Mutual Life Insurance Company of New York, the plaintiff in error, to recover the proceeds of said policy, claiming the policy as belonging to the estate of Henri (fols. 38 and 15). The Mutual Life Insurance Company of New York appeared in the action and contested it. The Court decided about October 15th, 1895, that the policy belonged to the administrator and that he was entitled to recover from the company, the plaintiff in error, the sum of $5,599.59 (fols. 38 and 15).

The action was founded upon the fact that statute in Hawaii provided that whenever a divorce was decreed for the adultery of a wife, the husband shall hold her personal estate for ever (fol. 39). Carter, the administrator, claimed the beneficial interest of Mrs. McGrew in the policy had passed to Henri G. McGrew upon the rendition of the decree of divorce, and that upon the latter's death it vested in his personal representative (fol. 15 and Opinion Hawaiian Court in appendix to this brief).

The company answered contesting the claim made by Carter, administrator, and claimed that the policy belonged to Alphonsine, the first beneficiary named therein.

Judgment was given for Carter, administrator.

The following questions were reserved by the Circuit Court of Hawaii:

1. Is Alphonsine McGrew a necessary party to this case?

2. Were Henri McGrew and Alphonsine McGrew divorced, and if so, is the decree of divorce still in effect?

3. Is the amount due on Henri G. McGrew's insurance

payable to J. O. Carter, administrator of the estate of H. G. McGrew?

From the judgment an appeal was prosecuted on the Supreme Court of Hawaii, and after an elaborate argument a decision was rendered affirming the judgment (see Carter *vs.* The Mutual Life, 10 Hawaiian Reports, 117).

The Mutual Life Insurance Company then filed a petition for rehearing on which exhaustive oral argument was again heard and a second opinion rendered (Carter *vs.* Mutual Life, 10 Hawaiian Reports, 559), confirming the principles of the first opinion, and deciding, in addition:

1. That the statute was constitutional.
2. That the property rights in the policy were a necessary incident to the divorce decree and passed by operation of law.
3. That the removal of Alphonsine from Hawaii before the rendition of the decree did not take away its operative effect upon her personal estate.

Rehearing was denied, and the Company was, as stated, compelled to pay the amount of the policy with interest and costs and received from the administrator the policy cancelled and receipt in full, and the monies were paid over for the benefit of Henri's son (fol. 15 and Opinion in appendix to this brief).

The Suit in California.

Alphonsine McGrew commenced this action in California, against the Mutual Life Insurance Company of New York, claiming that the same insurance policy belonged to her. An amended complaint was filed August 14, 1895 (Record, fol. 6).

The defendant in its answer at Paragraph VII thereof pleaded the statute of Hawaii, above mentioned, &c., and claimed in said answer that

> "*under and by virtue of the foregoing provision of law 'and decree of divorce'* all rights of the said Alphonsine C. McGrew in and to said policy of insurance *did pass to the said Henri Golden McGrew* and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever" (Record, fol. 14).

The answer then sets out the death of Henri McGrew, the appointment of Carter as his administrator, the commencement of the action above mentioned by Carter, administrator, &c., in the Circuit Court of Hawaii to collect on the said policy, the judgment rendered therein in favor of said Carter, administrator, the sustaining of said judgment by the Supreme Court of Hawaii, the denial of defendant's motion for a rehearing and alleges that the said judgment is now final (Record, fol. 15). The answer further sets out that subsequently *the defendant paid to Carter, administrator, the full amount due thereon, namely, $5,599.59*, and received from the said administrator the said policy of insurance duly cancelled.

It is to be observed that the Hawaiian case was finally decided in December, 1896, and afterwards, and in January, 1897, Alphonsine tried to re-open the divorce case in Hawaii (10 Hawaiian Rep., 600) but failed, and *then* proceeded in May, 1897, with the trial of this case.

On the trial of the action in the California Superior Court the defendant there, the Insurance Company, among other things proved the judgment and decree of divorce under the circumstances above set forth as alleged in defendant's answer, the death of said Henri G. McGrew (Record, fol. 38) and offered testimony to prove.

XVII. —"That J. O. Carter, of said Honolulu, is the duly appointed administrator of the estate of Henri G. McGrew, deceased, and that as such administrator he brought suit, after the death of said Henry G. McGrew, in the courts of the Republic of Hawaii, against the said Mutual Life Insurance Company upon the same policy of insurance which is the subject of this suit, and recovered judgment thereon, which judgment was sustained by the Supreme Court of the Republic of Hawaii, and a motion for re-hearing of said cause, made by the said Mutual Life Insurance Company, was denied by the said Supreme Court, and the said Mutual Life Insurance Company of New York, thereupon paid to said J. O. Carter, administrator as aforesaid, the full amount of the $5,000 due by the said company upon said policy of insurance, and the said J. O. Carter thereupon executed to the said company a full receipt and release of all claim on account and by reason of the said policy, and delivered said policy to said insurance company.

The introduction of which said testimony, appearing in the paragraph designated XVII heretofore, was objected to by counsel for plaintiff upon the ground that the same was *incompetent, irrelevant and immaterial*, which said objection was by the court *sustained*, and *an exception* allowed said defendant, which said exception is hereby designated exception No. 1."

The defendant in that action put in evidence the laws of Hawaii as to the effect of a decree of divorce on the wife's property, as above set forth (fol. 39), the opinions of the Supreme Court of Hawaii in McGrew *vs.* McGrew and Carter *vs.* The Mutual Life Insurance Company (fol. 40). The plaintiff called Alphonsine McGrew, as a witness, who testified among other things that she left Honolulu, April 5, 1894 with her minor son (fol. 55), with the intention of living in California (fol. 57); that she did not take the policy of insurance with her, "Mr. Carter had it" (fol. 62).

The Superior Court of San Francisco, after a trial of the case, May 13, 1897, decided on October 11th, 1897,

"That the rights of this plaintiff in and to said policy of insurance and the moneys due thereunder *never passed to said Henri G. McGrew, nor did he ever hold her rights or property in said policy or money, nor did said policy or the money due thereunder, nor this plaintiff's rights therein, ever become the property of said Henri G. McGrew*" (Record, fol. 21).

The Court further decided that

"said plaintiff is entitled to judgment against the defendant for the sum of $5,000" and interest and costs.

Judgment was entered thereon October 11, 1897 against the Mutual Life Insurance Company for $5,935.30 with costs (Record, fol. 22).

The Treaty Provision.

The contracting parties engage, in regard to the personal privileges that the citizens of the United States of America shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the States of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, by sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country

wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case until the lawful owner may take measures for receiving them.

And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the lands wherein the said goods are.

See 9 U. S. Stat., at L. 977;

Also Treaties and Conventions of the United States, by Haswell, p. 542.

1898, April, Appeal to Supreme Court, Hawaii, submitted. Treaty in force at this time.

1898, July 7th. Hawaiian Annexation Act passed, taking effect August 12, 1898 (volume 2, supplement Revised Statutes of the United States, 1897 to 1899, page 895, 30 U. S. St. at L. 750); 31 U. S. Statutes at large, page 141, and Hawaiian Islands annexed as part of territory of the United States, becoming the "territory of Hawaii."

This Act provided amongst other things as follows:

"The existing treaties of the Hawaiian Islands "with foreign nations shall forthwith cease and de- "termine, being replaced by such treaties, as may ex- "ist, or as may be hereafter concluded, between the "United States and such foreign nations."

"The municipal legislation of the Hawaiian Is- "lands, not enacted for the fulfillment of the treaties "so extinguished, and not inconsistent with this joint "resolution nor contrary to the Constitution of the

"United States, nor to any existing treaty of the "United States, shall remain in force until the Con- "gress of the United States shall otherwise deter- "mine."

1900, Apl. 30. Act passed to provide a government for Territory of Hawaii.

This Act provided, among other things, as follows:

"SECTION 5. That the Constitution, and, except as "herein otherwise provided, all the laws of the "United States which are not locally inapplicable, "shall have the same force and effect within the said "territory as elsewhere in the United States.

"SECTION 6. That the Laws of Hawaii not incon- "sistent with the Constitution or Laws of the United "States or the provisions of this Act shall continue "in force, subject to repeal or amendment by the "Legislature of Hawaii or the Congress of the United "States.

"SECTION 10. That all rights of action, suits at law "and in equity, prosecutions and judgments existing "prior to the taking effect of this Act shall continue "to be as effectual as if this Act had not been "passed."

1901, Feb. 28. Decision in Supreme Court of California.

The language of the statute under which we claim is as follows:

Revised Statutes of the United States, Sec. 709.

"Sec. 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity;

or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity ; *or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.* The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ.

The Constitutional Provision.

Constitution of the United States, Art. IV., Sec. 1.

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Hawaiian Statute as to Common Law.

"The common law of England, as ascertained by "English and American decisions, is hereby declared to "be the common law of the Hawaiian Islands in all cases,

"except as otherwise expressly provided by the Hawaiian "Constitution or laws, or fixed by Hawaiian judicial "precedent or established by Hawaiian national usage, "provided, however, that no person shall be subject to "criminal proceedings except as provided by the Hawaiian "laws."

Laws of Hawaii, 1892, Chap. LVII, Sec. 5.

See also

Civil Laws of the Hawaiian Islands, 1897, Sec. 1109.

On the motion to dismiss in this Court some reference was made to harsh treatment on the part of the husband (which is contrary to the evidence, fol. 56), but this is as uncalled for, so far as the record is concerned, as was the statement of the California Court that the defense "is rather a remarkable one" (fol. 190), and that the evidence as to the wife's adultery was conflicting (fol. 192), or as would be a statement by this plaintiff in error that the defendant had married an actor and gone to France, presumably forever. The testimony introduced by the defendant in error was plainly intended to create an artificial sympathy for the plaintiff. The situation was really this: Henri, presumably while a medical student in Paris, meets Alphonsine there and marries her in 1890. They return to Hawaii, have a child, and she commits adultery several times. Prior to this and some two years after his marriage, he takes out a policy payable to Alphonsine, "wife of Henri C. McGrew," if living, if not living, to his executors, etc. That is, if his *wife* is not living, he was to control it. This policy he kept in his own safe, and Alphonsine told Henri's guardian that it belonged to her husband (Rec., p. 30). Six months after the policy was taken out Henri and Alphonsine came to California for the former's health, and returned to Honolulu in

December, 1893. Then Henri becomes insane, and in February, 1894, his guardian begins the divorce case. Under the law of Hawaii in such case, if the adultery was committed, the wife's contingent interest under the policy would revert to Henri. All parties were then domiciled there and living under these laws. Alphonsine then flees from Honolulu, abducting the child, [for its custody was asked for in the libel (Rec. p. 15)], and is found to have committed adultery, and then Henri dies, leaving the young son. The administrator collects the policy for the benefit of this son. The guilty mother then, after having abandoned the policy in Hawaii, and fled from the jurisdiction of those courts, seeks in the court of another jurisdiction to get for herself also the benefit of insurance her son has already gotten, although by the law of her husband's domicil, who took out and paid for the policy, she has no interest in it, and seeks to mulct this defendant out of $10,000, when Henri only paid for $5,000.

III.

Statement of the Case as Required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised. The question is whether the decision in the Supreme Court of the State of California was against the title, right, privilege or immunity claimed by the plaintiff in error under the treaty existing between the United States and Hawaii by which it was provided, among other things, "that if a question should arise among several claim-"ants, as to which of them said goods belonged, the

"same should be decided finally by the laws and judges of "the land wherein said goods are" (Rec. p. 111), and connected therewith and as an enlargement thereof the further question whether said decision did not violate Art. IV, Sec. 1, of the Constitution of the United States, in that full faith and credit were not given in California to the Public Acts, Records and Judicial Proceedings of the Territory of Hawaii.

IV.

Specification of Errors.

The following are the errors assigned by the plaintiff in error and upon which it relies for the reversal of this cause (fol. 224).

The said Supreme Court of the State of California erred in giving and entering judgment against the plaintiff in error and in favor of the defendant in error, the ground of such error being that the ownership of the policy upon which said action is based had been decided by the Courts of last resort of Hawaii to be in Henri G. McGrew and by succession in Carter, her administrator, and not in said defendant in error, and therefore the decision of the Supreme Court of the State of California in said action is repugnant to the provisions of the treaty between the United States and the Republic of Hawaii by which it was provided, among other things, "that if a question should arise among several "claimants, as to which of them said goods belonged the "same should be decided finally by the laws and judges "of the land wherein said goods are," and said decision of the said Supreme Court of California deprived this plaintiff in error of a right conferred by said treaty, and as

connected therewith and as an enlargement thereof, that said decision violates the Constitutionof the United States, in that full faith and credit were not given in California to the Public Acts, Records and Judicial Proceedings of the Territory of Hawaii, namely the decrees in the divorce and administrators action, and the public acts in regard to the effect of the divorce decree.

V.

The Federal Questions.

There can be no dispute but that the Federal questions as to the Treaty were, as a matter of fact, fully presented to the courts of California, and opposing counsel do not contend that such questions were not presented. They base their motion to dismiss entirely upon the way the questions were presented, as shown by this record, and claim that they were not presented in such a way that this Court ought to review the action by the State Court of California.

The constitutional question arose pending the decision in the Appellate Tribunal.

POINT I.

The Federal questions were sufficiently claimed in the California Courts by the pleadings, proof, and Assignments of Error in the Trial Court.

In these Points I to V inclusive the proposition is advanced and abundantly supported that the Federal question as to the Treaty was expressly raised from the beginning even though the Treaty ipsissimis verbis was not *expressly* and in or many words mentioned. And further that the pleading of the divorce decree, the judgment in the administration action and the Hawaii Statute, and the testimony and other proceedings in the California case were a sufficient foundation for the application on the appeal by the California Supreme Court of the Constitutional provision, requiring full faith and credit to be given to such judgments and public acts. The most convenient way of demonstrating the above is to consider the successive stages of the litigation in their order, which is done in the following points, taking up in this Point, (1) the pleadings and the evidence and (2) the assignment of error.

The merits of the motion to dismiss cannot be disposed of by the mere application of one or more of the decisions of this Court which cover perhaps only one feature of the case. When the record which we present is illumined by the broad-minded and oft-repeated test announced by this Court, that is, was the mind of the State Court directed to the fact that a right protected by treaty was relied upon, it is impossible to come to any other conclusion than that this Court has jurisdiction.

In the argument presented herein this Court is asked to bear in mind its unanimous statement in French *vs.* Hopkins, 124 U. S., 524, as follows:

"The record fails to show, either *expressly or by im-*
" *plication, that* any 'right, title, privilege or immunity'
" under the Constitution or laws of the United States, was
" specially set up or claimed in either of the Courts
" below."

We maintain that our claim was made expressly and also by implication in the Courts of California, and in considering §709, quoted in Brown *vs.* Massachusetts, 144 U. S., 579, the Court says the objection was not "taken in any " form, either expressly, or *by any possible inference or* " *implication, before* verdict" nor afterwards.

In Butler *vs.* Gage, 138 U. S., 61, this Court says:

"The Supreme Court of the State confessedly went to judgment without any suggestion that a Federal question was presented for its determination, *and not even in the petition for rehearing* was any such question brought to the attention of the Court."

In Sayward *vs.* Denny, 158 U. S., 184, this Court says:

" Or, at all events, it must appear from the record, *by clear and necessary intendment*, that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision. (Powell *vs.* Brunswick Co., 150 U. S., 400, 433)."

In Oxley Stave Co. *vs.* Butler, 166 U. S., 653, this Court laid down the following:

" Looking into the record we do not find that any ref-
" erence was made in the Court of original jurisdiction to
" the Constitution of the United States. Nor can it be in-
" ferred from the opinion of the Supreme Court of Mis-
" souri that the Court was informed by the contention of
" the parties that any Federal right, privilege or immu-

"nity was intended to be asserted. For aught that ap-
"pears the State Court proceeded in its determination of
"the cause without any thought that it was expected to
"decide a Federal question."

"If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, *our jurisdiction could be sustained.* But this does not appear." Page 660.

Submitting this case to the test so outlined, it will be manifest from what follows that it can be readily inferred from the California opinion that that Court was informed by contention of the plaintiff in error that a Federal right was intended to be asserted and denied the right so asserted. It would be preposterous in this case to claim that the California Court proceeded in its determination without any thought that it was expected to decide a Federal question.

The question is, did the party bringing the case here intend to assert below a Federal right?

Michigan Sugar Co. *vs.* Michigan, 185 U. S., 113.

(*1.*) *The Pleadings and Evidence:*

The Supreme Court of California itself construed the *record* as raising a Federal question.

They say:

"The *defense* is rather a remarkable one; it rests upon a decree of divorce rendered by a court of the Republic of Hawaii, a decree which could not have been obtained here; and upon an Hawaiian statute which has no force *except by comity.*"

It is important to note what is meant by "comity." Now in Barnett's Trusts, 1 Ch., 1902, p. 858, Kekewich

J., says, "if a case arises where there is a conflict between the law of two countries on the subject, a more difficult question may have to be decided on the ground of international comity."

And in Fergusson's Will 1 Ch., 1902, p. 486, the Court says: "That results from the rules followed by the comity of nations which we call international law." That is the California court claimed the record raised a conflict of laws and that the Hawaiian laws and the *lex fori* controlled, if at all, on the ground of international comity or international law, rejecting wholly their control by *treaty* which was what was being urged. The *denial* of the *treaty* rights was thus distinct.

This Court has frequently taken jurisdiction where the judgment of a *sister State* is pleaded as *res adjudicata* in the State Court, although *no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.*

That is, the *pleading* was a sufficient compliance with the clause in § 709, "specially set up or claimed." Thus in Bell *vs.* Bell, 181 U. S., 175, the defendant pleaded the judgment for divorce in Pennsylvania, but did not otherwise specially set up or claim any right under Const., Art. IV, *and this Court took jurisdiction.*

The only answer which defendants in error made to Bell *v.* Bell is on page 24 of their brief; in that they say "the mere pleading of a judgment of a sister State might "well be held to be a special setting up of a right under "this particular provision of the Constitution, as the "pleading of it not only necessarily would suggest such a "provision, but could raise no other question. In the case "at bar, the plea of the decree of divorce and the statute "did not necessarily suggest the treaty, nor were they "made competent by the treaty."

But counsel forgets that *the treaty* is as much the supreme law of the land as the Constitution.

In the late case of Sweringen *vs.* St. Louis, 185 U. S., 45, this Court says:

"Nor was any Federal question raised under the third "clause of that section. Under that clause no title, etc., "or authority exercised under the United States, was "specially set up and claimed by the plaintiff, and there "was no decision against any title, etc., specially set up "or claimed by the plaintiff. There was no decision of "any Federal question whatever. *We do not hold it was "necessary to plead the claim in order to show it was "specially set up, but it must have been so referred to and "mentioned as to show that it was present in the minds "of the parties claiming the right, or must have been in "some way presented to the court* (Oxley Stave Co. *v.* "Butler County, 166 U. S., 648; Green Bay, etc. Co. *v.* Pat-"ten Co., 172 U. S., 58; Columbia Water Power Co. *v.* Col-"umbia Railway, 172 U. S., 475; Dewey *v.* Des Moines, "173 U. S., 193, 199). * * *

"It does not appear in the record that any such claim "was made in the trial court *or upon appeal* in the Su-"preme Court of the State".

By parity of reasoning pleading as this company did, the Hawaiian decrees and statute, "it specially set up or claimed" a right under the treaty (which subsequently became a right under the Constitution), and a Federal question was thereby necessarily injected into the record.

The answer further shows that the courts of Hawaii subsequently determined in the action of *Carter, administrator,* v. *Mutual Life Insurance Co.*, 10 Hawaiian R., 117 and 570 (the opinions are submitted herewith as an appendix), that the decree referred to did operate upon the interest of Mrs. McGrew in this very policy of in-

surance, and that the administrator of her former husband's estate was entitled to recover upon it. For that reason the company was *compelled* to pay to him the full amount with interest.

The California Court refused to follow the Hawaiian laws and judges, and decided that Mrs. McGrew *did not* lose her beneficial interest by the divorce proceedings.

Thus the company would be compelled *to pay the same policy twice, though paid for but once*, notwithstanding the treaty, and Constitution properly prevent it.

The effect of this Hawaiian decree upon the property involved and the administrators judgment was *the defense.* The answer shows in detail the facts conferring jurisdiction upon the Hawaiian Courts, and *claims* that by the divorce judgment, which is set out in *hæc verba* Mrs. McGrew had ceased to be the owner of the policy. It alleged, "That "under and by virtue of the foregoing provision of law, "and decree of divorce, all rights of the said Alphonsine "C. McGrew in and to said policy of insurance did pass "to the said Henri Golden McGrew and become his abso- "lute property free and clear of any claims of the said "Alphonsine C. McGrew, plaintiff herein, whatsoever," (Record, fol. 14). The answer also fully pleaded the Carter judgment and payment thereof.

The issues raised by the *pleadings*, thus claimed *broadly* that by the decree of divorce the policy went to the husband, and that by the laws and judges of the land it was finally decided to belong to his administrator.

This is a general claim; it is as much a claim that it passed by reason of *the treaty giving an extra territorial effect to the Hawaiian divorce, and the decree in the Carter case*, as if such statement "*in ipsissimis verbis*" had been directly and positively made. For the same reason, pleading *payment and performance* in pursuance of the *Hawaiian* decision and judgment, is equivalent to claiming that *on account*

of the treaty such payment protected it from further litigation as to the policy. *The California Supreme Court in its opinion virtually states that the defense in California rests upon the Treaty, for it says* (Rec., fol. 190) "the defense is rather a remarkable one; it rests upon "* * * a decree which would not have been ob- "tained here; and upon an Hawaiian statute which has no "force *here except by comity.*"

By thus pleading the *final adjudication of the Court of a foreign country*, involving *the operative effect of* a previous judicial decree and *statute of that country*, the defendant in error necessarily presented to the trial Court a federal question, viz.: a right claimed under a treaty then existing between that foreign country and the United States, and if the decision of the State Court is against that right it is submitted that the federal question is "specially set up or claimed" within the purview of Section 709 Revised Statutes.

For this treaty was "as much a part of the law of every State as its own local laws and constitution."

Hauenstein v. *Lynham*, 100 U. S., 483, 490.

"All treaties made, or which shall be made, under the "Authority of the United States shall be the Supreme Law "of the land; and the Judges in every State shall be bound "thereby, any Thing in the Constitution or Laws of any "State to the Contrary notwithstanding."

Const., Art. VI, § 2.

This Court early held in dealing with a right conferred by treaty that,

"In the construction of that section, the Court has never required that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a State

Court into review before this Court, should have been pleaded specially, or spread on the record" (Per MARSHALL, C. J.).

Hickie vs. *Starke*, 1 Pet., 98.

It is submitted that this Court has never held that the Federal question must appear in the record by *direct language*. On the contrary:

"The true test is not whether the record exhibits an "express statement that a Federal question was pre- "sented, but whether such a question was decided, and "decided adversely to the Federal right. Everywhere " in our decisions it has been held that we may review the "judgments of a State Court when the determination or "judgment of that Court could not have been given "without deciding upon a right or authority claimed to "exist under the Constitution, laws, or treaties of the "United States, and deciding against that right. *Very "little importance has been attached to the inquiry "whether the Federal question was formally raised.* In "*Crowell* v. *Randall* (10 Pet., 338, 397), it was laid down, "after a review of almost all our previous decisions, 'that " 'it is not necessary, that the question should appear on " 'the record to have been raised, and the decision made " 'in direct and positive terms, *ipsissimis verbis;* but " 'that it is sufficient if it appears by clear and neces- " 'sary intendment, that the question must have been " 'raised, and must have been decided, in order to have " 'induced the judgment."

Murray v. *Charleston*, 96 U. S., 442.

There are many decisions to the effect that "*in some cases*," in order to raise the Federal question, it is necessary to show that the Federal right relied on had by "adequate specification been called to the attention of the State Court." *But those cases are all of them cases in which the Federal question was not "necessarily involved* in the decision."

This distinction must be kept in mind in considering

the authorities. Many cases cited and relied on by defendant in error are cases of that character, and are not in point and are irrelevant to the case at bar.

Some cases calling attention to this distinction are Capital City Dairy Company *vs.* Ohio, 183 U. S., 238, 248, where the rule is stated to be that in cases in which the Federal question is "*not necessarily involved in the determination of the cause*" it is necessary to show that the Federal right relied upon had been by adequate specification called to the attention of the Court and had by it been considered.

Also Green Bay, &c., Canal Co. *vs.* Patten Paper Company, 172 U. S., 58, 68, as follows:

"If it appear, from the record, by clear and necessary "intendment, that the Federal question *must have been* "*directly involved, so that the State Court could not have* "*given* judgment without deciding, it that will be sufficient,"

citing Roby *v.* Colehour, 146 U. S., 153, 159, and other cases. Also Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, on page 142, as follows:

"If the Courts of this country, and especially this "Court, can be supposed to take judicial notice of any- "thing without pleading it specially, it is the Constitu- "tion of the United States. And if the plaintiff and defend- "ant in their pleadings, make a case which *necessarily* "*comes within some of the provisions of that instrument*, "this Court surely can *recognize the fact* without requir- "ing the pleader to say in words: 'This paragraph of the "'Constitution is the one involved in this case.'"

This last case will be again referred to in connection with the Constitutional point raised in this case.

Also on page 68 (172 U. S.) as follows:

"The true and rational rule is, that the Court must be "able to see clearly, *from the whole record*, that a certain

"provision of the Constitution or Act of Congress was "*relied* on by the party who brings the writ of error, and "that the right thus claimed by him was denied" (citing Bridge Proprietors *v.* Hoboken Co., 1 Wall, 143; also Robie *v.* Colehour, 146 U. S., 153, 159, in which it was said that "it must appear from the record of the case "either that the right, so set up and claimed, was expressly "denied, or that such was the necessary effect in law of "the judgment."

If this Federal question is in the record there is jurisdiction, even if the State Court had ignored it in its opinion.

The decision of the alleged Federal question was necessary to the judgment rendered, and hence gives jurisdiction.

Brooks v. Missouri, 124 U. S., 394, 400.
Armstrong *v.* Treasurer of Athens County, 16 Peters, 281, on p. 285.

In Eureka Lake Company *v.* Yuba County, 116 U. S., 410, 415, Mr. Chief Justice WAITE, in delivering the opinion of the Court, states the rule to be that, where the Federal question is raised *in the U. S. Supreme Court*, it is of no importance that "it does not *appear affirmatively* "on the face of the record" that the Federal question was raised, provided "*it is possible its decision was necessa-* "*rily involved in the final order that was made. For* "*this reason* the motion to dismiss is overruled."

In Arrowsmith *v.* Harmoning, 118 U. S., 194, 195, Mr. Chief Justice WAITE, delivering the opinion of the Court, uses the following language:

"This is the first time, so far as the record discloses, "that even the semblance of a Federal right was set up in "the case. * * * The decision, however, *necessarily*

"*involved a denial of the right which was claimed in this* "*way*, and thus we probably have technical jurisdiction. "For this reason the motion to dismiss must be denied."

And this rule is followed where a right is set up under the *third* clause of Section 709 as well as under the *first* and *second* clauses.

"If the record shows, * * * by *clear and necessary* "*intendment*, that the constitutional provision did arise, "and that the Court below could not have reached the con- "clusion and judgment it did reach, without applying it to "the case in hand, then the jurisdiction of this Court at- "taches. * * * It is sufficient to confer jurisdiction "*that the question was in the case*, was decided adversely "to the plaintiffs in error, and that the Court was induced "by it to make the judgment which it did."

Furman *v.* Nichol, 8 Wall., 44, 56.

Reference is also made to the following cases:

Hickie *v.* Starke, 1 Peters, 94;
Martin *v.* Hunter's Lessee, 1 Wheat., 305, 355;
Craig *v.* State of Missouri, 4 Peters, 410.

These cases were cases where a "title" was claimed under a treaty, and it was held sufficient if the record shows a complete *title* under a treaty and that the judgment of the Court is in violation of that treaty.

We claim that the record in our case shows a "complete" *right* under a treaty, and that the judgment of the Court is in violation of that treaty.

See also:

The Mayor, &c., *v.* De Armas, 9 Peters, 224.

Crowell *v.* Randell, 10 Peters, 368, where, between pages

392 and 398, Judge STORY reviews many cases and sums up by saying:

"It is not necessary the question should appear on the "record to have been raised, and the decision made in "direct and positive terms, *ipsissimis verbis;* but that "it is sufficient if it appears by clear and necessary in- "tendment, that the question must have been raised, and "must have been decided in order to have induced the "judgment."

There could be but one reason before the Constitutional provision took effect, why this foreign judgment bound the California Court and why this judgment gave the Insurance Company "immunity," and that was because of the treaty. It is true, this record does not disclose the fact that the Insurance Company *argued* before the trial Court that the evidence was material *on account of the treaty.* It is not necessary that the record should show this. The evidence was offered as being material, and excluded because the Court decided it to be immaterial. It *was* material *because* the treaty, the supreme law of California, of which the Court took judicial cognizance, and subsequently the Constitution *made it material.* The Trial Court could not have decided on the materiality of this evidence without considering and deciding the treaty question. The treaty question was necessarily involved in that decision, and such decision was against this plaintiff in error on the treaty question, and denied to the Insurance Company rights thereunder. By that ruling the California Trial Court decided that the performance of the Insurance Company, in accordance with the treaty, namely, the payment by it under the statute of Hawaii and the judgment of its Court which the Insurance Company claimed should therefore be *final,* was *not final,* and did not protect it from another suit in California. The denial of the treaty right "was the necessary effect in law" of

that decision. Therefore, the Federal question was *necessarily involved* in that decision, and is now before this Court.

Exception was taken to the ruling of the Trial Court. An appeal was taken to the California Supreme Court, and the question of the materiality of this evidence was presented to and argued before the Appellate Court of California.

(3.) *The Assignments of Error on the appeal to the Supreme Court of California* (fols. 70-78).

The findings of the Trial Court and the admitted statement of facts upon which the case was tried, deal wholly with these Hawaiian judgments and Hawaiian law. And the assignment of errors in the California Court (fol. 74) has for its contention the following:

"The said findings of fact do not determine the issues raised by the following allegation in said answer: 'that under and by virtue of the foregoing provision of law and decree of divorce, all rights of the said Alphonsine McGrew in, and to said policy of insurance did pass to the said Henri Golden McGrew, and become his absolute property, free and clear of any claim of the said Alphonsine McGrew, plaintiff herein, whatsoever.'"

And further in the assignment of error, the defendant in that Court, called to the attention of the Appellate Court in subdivision C of the first assignments of error as to the law, that the findings of the Trial Court did not determine the issue, "that the said insurance company had been *com-* "*pelled* to pay to J. O. Carter, as the administrator of the "estate of Henri Golden McGrew, deceased, the full amount "of said policy, and that by said payment, said defendant "discharged all its obligations in said policy to anyone "whomsoever" (Record, fol. 74), and in the first assignment of errors of law covered by exception, the defendant there

called the attention of the Court to the error in excluding evidence of payment to Carter, administrator, of the full amount of the policy (Record, fol. 75).

This was a claim under the treaty, *for by the treaty alone was such effect given to the* determination of the Hawaiian Supreme Court defining the effect of the decree of divorce and the statute in changing the title to the policy of insurance, as warranted the insurance company in claiming that a *California* Court should regard the Carter judgment as one compelling the insurance company to pay, and such payment as one by which the insurance company discharged all its obligations.

This was a claim that the question among several claimants as to which of them the goods belonged, had been decided finally by the laws and judges of the land wherein the said goods were.

This is amply sufficient according to the most recent statement of this Court by Mr. Justice Brown on Jan. 5, 1903, in Johnson *vs.* New York Life, as follows:

"Conceding that it was unnecessary to set it up in any "pleading anterior to the trial, since it could not be "claimed that the right had been denied to her until the "trial took place, it was clearly her duty to make the "claim either on the motion for a new trial or in the as-"signments of error filed in the Supreme Court of the "State. In neither does it appear, nor is there any allu-"sion to it in the opinion of the Supreme Court. It first "appears in the petition for a writ of error from this "Court. This is clearly insufficient."

The main claim of the defendant in error is, that the writ should be dismissed because no federal question was *specially set up or claimed in the trial Court.*

But there is no such narrow holding in this Court. The cases cited by the moving party are either irrelevant or opposed to any such contention. Parmelee *v.* Lawrence, 78 U. S., 38, was a case where the certificate of the

presiding Judge attempted to *originate* the question. Brooks *v.* Missouri, 124 U. S., 394, was a case where no rehearing was involved, as in our case, and held, if decision of federal questions was necessary to judgment rendered, it is sufficient to give jurisdiction. Baldwin *vs.* Kansas, 129 U. S., 57, was a case where the State Supreme Court expressly refused to consider the question because it was not raised at the trial. Brown *v.* Massachusetts, 144 N. Y., 579, simply follows the last case. In Oxley Stave Co. *vs.* Butler Co., 166 U. S., 653, there is nothing opposed to our contentions; on the other hand it favors them as shown above. Water Co. *vs.* Electric Co., 172 U. S., 488, has been considered elsewhere by us and is in our favor. In Chapin *vs.* Fye, 179 U. S., 129, the questions were only raised in the application for the writ of error to this Court.

POINT II.

The Federal questions were, therefore, necessarily involved in the Supreme Court of California on appeal, and were fully presented there by counsel.

All the matter in Point I alleged to have been before the trial Court, including the federal question, was, of course, subsequently before the Supreme Court.

The briefs of the Mutual Life presenting the Federal question will be found at fol. 174, and the clerk of a Supreme Court of California certifies that such briefs, amongst other papers, "is a true and correct copy of recorders "(*sic*) in S F. 1230; McGrew *vs.* Mutual Life, consisting "of pages one to two hundred and twenty-nine—and same "constitute all papers on writ of error in above entitled "cause as shown by the records of my office" (fol. 231).

These briefs support the position taken in Point I in that they are consistent with the claim there made, and in view of their presence, how can it be said, to use the test of this Court elsewhere alluded to, that the mind of the State Court was not directed to the Federal question?

It is no answer for defendant in error to say that they are no part of the record, for although *now* a copy of the *opinion is required* to be incorporated in the transcript by the eighth-rule, and *this court looks at it for a Federal question*, yet this Court has said *it was no part of the record.*

In the brief of the Insurance Company on the appeal to the California Supreme Court this federal contention is made clear, for there it is definitely and distinctly claimed that the evidence of performance, under the decree of the Hawaiian Courts, was material, and such payment was a discharge of all its obligations in said policy *for the reason that "the decree of the Hawaiian Court is binding on ac-* "*count of treaty obligations between the United States* and "that country," and reference is there made to Article VIII of the treaty (see brief of the original defendant, Record, fols. 102, 103).

The language of the brief at fol. 103, after referring (at fol. 102) to the "binding effect of a decree of a foreign Court," as decided in Hilton *v.* Guyot, 159 U. S., 202, is as follows:

"The principle thus laid down in Hilton *v.* Guyot, is especially applicable to an Hawaiian judgment, *on account of the treaty obligations between the United States and that country.* By Article VIII of the treaty, proclaimed November 9, 1850 (Treaties and Conventions of the United States, page 540), of which this Court will take judicial cognizance (Sec. 1875, C. C. P.), it was provided that the rights to the personal property of a citizen of either country should be 'decided finally by the laws and 'Judges in the land wherein the said goods are.' * * *

The judgment of the Court below violates this treaty obligation in that it has not left the decision, as to the ownership of this insurance policy, to the laws and Judges of Hawaii" (fol. 103).

Again in the reply brief of the Insurance Company before the California Appellate Court, its counsel expressly claims rights under the treaty as follows (see fols. 173 and 174): "We contend that respect for the Hawaiian decree *is secured by treaty stipulation*," *citing the terms of the treaty*, and it there claims that the treaty is part of the law of the State of California (fol. 174). The plaintiff in error there states its claim as follows:

"It is not at all material where the policy was at the beginning of this present action, but where it was when the respondent, by appearing in the divorce proceedings, submitted to the jurisdiction of the Hawaiian Court. *To hold otherwise would be to disregard this treaty.*"

"With us a treaty is a part of the supreme law of the land; as such it influences and controls the decisions of tribunals. * * * Nations are bound to maintain respectable tribunals, to which the subjects of States at peace may have recourse for the redress of injuries, and the maintenance of their rights. If the character of these tribunals be respectable, impartial and independent, their decisions are to be regarded as conclusive."

Also, again at folio 178, as follows:

"Therefore, whether the cause of action is to be considered as having arisen when the decree of divorce was rendered, or when the action by the Hawaiian administrator to recover upon the policy was brought, in either case the '*goods*' were in Hawaii."

Counsel for Alphonsine, in their brief before the California Supreme Court, argue at length that the statute of Hawaii and the decree of its Court have no effect extra

territorially and are not binding on the California Court, and *explicitly claim that the treaty does not enlarge such effect.*

Thus in their brief (Record, fol. 147) as follows:

"We do not think that the treaty between the United States and Hawaii helps the appellant. This treaty provides 'that the rights to the personal property of a citizen 'of either country must be decided finally by the laws and 'Judges in the land wherein the said goods are situ-'ated.' This is very strong authority for respondent's contention."

Also in the reply brief of Alphonsine top page 92, fol.) 187), her counsel recognizes the fact that the treaty question was before the California Court, as they there claim that the argument of the insurance company in its reply brief "as to the effect of the treaty is * * * not in point."

Thus there seems to be no question but that the Federal right was necessarily involved in the claim of this plaintiff-in-error, and that the rights of the insurance company under the treaty, and the errors of the Trial Court in its rulings thereon, were fully called to the attention of the Appellate Court in California, and specially set up and claimed there, and were there argued by counsel for both parties and were considered by the Court.

New York Central Railroad Co. *vs.* New York, 186 U. S., 269, 273.

In this case the Court said: "But assuming, without "intimating an opinion to that effect, that the raising of "a Federal question in the brief might be sufficient, it is "well settled in this Court that it must be made to ap-"pear that some provision of the Federal, as distinguished "from the State, Constitution, was relied upon, and that "such provision must be set forth."

This Court should consider the *reasons given* by the plaintiff in error in its brief before the California Supreme

Court for offering in evidence the judgment of the Hawaiian Court and the payment by the company thereunder, and the reasons why they were material as evidence. As we heretofore have shown, the reasons given *to the trial court* for offering this evidence do not appear in the minutes of the trial, and properly so, but on the appeal to the Supreme Court those reasons are stated in the printed brief, being part of the printed record in which it was called to the attention of that Court that *the treaty* made the evidence material.

This shows not only that the State Appellate Court could not escape deciding this treaty question, but it also shows that the treaty question was presented to the *trial Court* and passed on by it when it decided such evidence to be immaterial and excluded it.

POINT III.

The treaty and constitutional point in question were involved in the decision of the Supreme Court of California and apply to this case.

(*a.*) THE TREATY POINT.

In the Supreme Court of California, in one of the briefs filed on behalf of the appellant company April 23rd, 1898 (p. 75), almost three years before the decision of the case by that Court (p. 93), it was contended "that respect for the Hawaiian decree is secured by treaty stipulations, which sometimes smooth the way for the recognition, in doubtful cases, of the effect of foreign judgments upon property rights and interests," and specific reference was

made to the protection claimed under the treaty between the United States and Hawaii of 1849 (p. 85).

The claim of the binding effect of the Hawaiian decree and statutes, and the applicability thereto of the terms of the treaty of 1849, was again reiterated in the petition for a rehearing (p. 103), as shown more fully under Point IV below, and was especially assigned in the petition for the writ of error as ground for its allowance (p. 109).

The decision of the Appellate Court was against this plaintiff in error's claim under the treaty; (See Record, fol. 194).

"The question, therefore is, what was the right of respondent to the property involved at the time when the said statute could be invoked? And it is clear that if at at that time *she was domiciled in California the Hawaiian statute had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile* (See Whitney *v.* Dodge, 105 Cal., 192, and authorities there cited).

In our opinion the respondent at the time when the Hawaiian statute took effect was domiciled in California."

Also at folio 198 as follows:

"Our conclusion is that at the date of the decree of divorce the respondent was domiciled in California, and had been since she came here in April, 1894; and that *therefore* the *Hawaiian statute under which the forfeiture of her personal property is claimed had no effect upon her or her property in California.*"

Again at folio 198 as follows:

"The Court did not err in excluding evidence of the fact that appellant had satisfied a judgment recovered against it by the administrator of Henri G. McGrew on the policy here sued on, in an action to which the respondent

here was not a party. The fact that appellant paid the policy to the wrong party would be no defense to an action brought by the right party."

Here the California Court distinctly and directly refuses to this plaintiff in error the "immunity" from further prosecution in the Courts of the United States granted it by the treaty, and sustains the trial court in its decision that it would not regard the law of Hawaii and the decisions of its Judges with respect to the ownership of the policy as binding, and that proof of payment and performance of the contract, in accordance with that law and those decisions, were immaterial.

At this point we remind the Court of its very recent case.

In Tullock v. *Mulvane, 184 U. S. 497, Mr. Justice White delivering the opinion of the Court states, pages 503, 504. that it is sufficient if the trial Court and State Appellate Court pass upon the Federal question, and that such passing upon the question "of itself suffices to present the Federal "question, even if it had been otherwise ambiguously "raised on the record."*

Raising the question on appeal is sufficient.

Sweringen *vs.* St. Louis, 185 U. S., 45.

It must be apparent from Points I and II above, and from an inspection of the record, that the decision of the State Courts could not have been reached without the denial of the principal ground of defence pleaded by the defendant, to wit: that the policy belonged to the husband had been adjudicated by the Hawaiian Courts to be goods in Hawaii and to be hisproperty, and that pursuant to the judgment of those Courts the policy *had been* paid to his administrator, such ground resting upon a right, privilege or immunity set up and claimed under the treaty between

the United States and Hawaii. As it is, the judgment of the highest Court of the State denying any such right, privilege or immunity is subject of review in this Court, and as it appears from the record in this case, that the foreign judgment or decree and the foreign statute were not only specially set up or claimed in the trial Court, but their effect under the terms of the treaty was also elaborately argued before judgment and reiterated after judgment in the State Supreme Court, it would seem that the defendant company, plaintiff in error here, had done all that could reasonably be required of it to preserve its right to have the federal question, necessarily and so prominently involved in the case, reviewed by this Court.

It is well settled that the right may be set up either in the Trial Court or in the State Supreme Court. "But the record does not show that the company specially "set up or claimed in the State Courts, *or either of them*, "any right under the Constitution of the United States."

Oxley Stave Co. vs. *Butler Co.*, 166 U. S., 659.

This policy was applied for by the insured in Hawaii, where he and his wife remained domiciled at the commencement of the divorce proceedings; there the first premium was paid, and there the policy first went into effect.

Mutual Life v. *Cohen*, 179 U. S., 262.

The defendant in error was served with summons and libel *in Hawaii;* and she appeared in that action and contested it to the end.

The Hawaiian law then in force provided, that in every case when a divorce was decreed, "for the adultery of the wife, the husband should hold her personal estate forever."

The Hawaiian Court held, in the action of *Carter* v.

Mutual Life, supra (submitted herewith as an appendix), that by the mandatory character of this statute the personal estate of the defendant was a part *of the subject-matter of the suit from its commencement*, and that Mrs. McGrew could not by transferring her domicile to California pending the suit take away anything from the jurisdiction already acquired.

The Supreme Court of California in its opinion held that the statute of Hawaii did not apply until the divorce decree was rendered, and that inasmuch as Mrs. McGrew was domiciled in California at that time, it did not therefore affect her property rights.

The latter Court quite ignored the proposition that Mrs. McGrew had already appeared in the action for divorce, and that the alienation of the wife's personal estate was, under the Hawaiian law, a *necessary incident* of every action for divorce upon the special ground mentioned.

It is claimed that the decision of the Court herein is against a right claimed to be conferred by a treaty existing between the United States and the Republic of Hawaii. Of this treaty this Court will take judicial cognizance (Section 1875, C. C. P.); and it is as much a part of the local law of the State of California as its own Constitution (Hauenstein *vs.* Lynham, 100 U. S., 483). This treaty provided:

"If a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are."

The term "goods" here refers to personal property, which in this case was an insurance policy. This policy was applied for and was delivered by the agent of the company in Honolulu; its premiums were paid there, and

there it took effect. It was, therefore, so far as the three parties to it, namely: the insured, the beneficiary and the company are concerned, an *Hawaiian contract.*

It was in the possession of Carter when the suit was brought in Hawaii, and surrendered up to the company for cancellation after payment.

That under such conditions the domicile of the insurance company, so far as the policy was concerned, was in Hawaii, is directly decided by the Supreme Court in New England Mutual Life Insurance Company *vs.* Woodworth, 111 U S., 138; and that where the first premium is paid and the policy delivered to the insured is the place where the policy takes effect, is also directly decided in Mutual Life Insurance Company *vs.* Cohen, 179 U. S., 262.

When the question arises as to the law which is to govern a particular contract, it is frequently necessary to decide that a chose in action has a *situs.* This may be held to be where the *debtor* resides or where the instrument actually is. The principle that the domicile of the owner controls, is not of universal application, and is never applied when there is an express statutory prohibition to the contrary.

We claim, therefore, that the *situs* of this insurance policy was in Hawaii, and therefore that the courts of that country had the right to finally determine to whom it belonged.

When the divorce action of McGrew *vs.* McGrew was commenced, both parties were domiciled in Hawaii, and Mrs. McGrew was served with process there. She appeared in the action and contested it from its beginning to its end. Her demurrer to the libel having been overruled, she appealed from that opinion directly to the Supreme Court (McGrew *vs.* McGrew, 9 Hawaiian Reports, 475); and another interlocutory order, ordering the

guardian to pay counsel fees *pendente lite* was also appealed from (9 Hawaiian Rep., 426).

After these matters were disposed of by the Supreme Court (the practice of that country allowing an appeal to be taken before final judgment), the case was set down for trial. This trial occupied two days' time; witnesses were produced by both parties, and after the decision granting plaintiff a divorce, an appeal was attempted by the defendant to this Supreme Court. It will thus be seen that Mrs. McGrew unqualifiedly submitted herself to the jurisdiction of the Hawaiian Court, not only by appearing therein, but also by contesting every phase of the litigation.

The effect which these divorce proceedings had upon her personal property rights was thereafter directly brought in issue by the case of Carter, Administrator, *vs.* Mutual Life Insurance Company of New York. This was an action brought upon the same policy of insurance as is now sued upon, and was based entirely upon the proposition that by the divorce the personal property of Mrs. McGrew had passed to her husband. This was a construction by the Hawaiian Court of its own statute and is a decision by the highest Court of that country that the "goods" here in question were not the property of Mrs. McGrew. By the treaty hereinbefore referred to, this decision of the Hawaiian Court is conclusive, and the decision of the California Court being diametrically opposed to the decision of the Hawaiian Court, deprives the defendant company of the right conferred by this treaty to have the question, to whom it owed the policy, determined by the law and judges of the land in which was the *situs* of the policy. This right as conferred by the treaty, has been claimed by the defendant as shown in Point I above. It was, therefore, embodied in the *record* of the case, because it is apparent that

the California Court could not have reached its conclusion without disregarding the judgment of the Hawaiian Court. The Hawaiian Courts decided that this policy of insurance was the property of McGrew's administrator, and the California Court has decided that it was the property of Mrs. McGrew. The conclusion of the latter Court could not have been reached except by holding that the policy was *not* the property of McGrew's administrator.

The first conclusion of law of the trial Court was that this policy of insurance (fol. 11) and the moneys due thereunder never passed to said Henri G. McGrew nor did he ever hold her rights or property in said policy or money.

This is a direct finding and adjudication by the Courts of California, in opposition to the conclusion of the Courts of Hawaii. The finding of the Hawaiian Court was that the rights of the plaintiff in and to this policy of insurance did pass to McGrew's administrator.

We must conclude, therefore, that the decision of the California Court is opposed to the decision of the highest Court of Hawaii concerning the title to property which was within the jurisdiction of the Hawaiian Court, all parties to which were properly domiciled there.

(b) The Constitutional Point.

This Court further has jurisdiction to determine whether the Supreme Court of California should not have applied Sec. 1, Article IV of the U. S. Constitution in regard to full faith and credit.

The applicability of this Constitutional provision is fully set out elsewhere in this brief, Point VI, B. This Court has *power* to consider such question. The treaty point is before it. It is sufficient if the Constitutional point is connected with it or is an enlargement of it.

Thus in Keokuk & Hamilton Bridge Co. *v.* Illinois, 175

U. S., 633, this Court says: "In Dewey *vs.* Des Moines, "173 U. S., 193, it was held that where a Federal question "is raised in the State Courts, the party who resorts to "this Court cannot raise another Federal question, *not* "*connected with it*, which was not raised in any of the "courts below."

In Dewey *vs.* Des Moines, 173 U. S., 193,197, the Court said: "Reference to the opinion of the Supreme Court of "the State shows that it was not therein discussed or de- "cided. If the questions were only *an enlargement of the* "*one mentioned in* the assignment of errors, or if it were "so connected with it in substance as to form but another "ground or reason for alleging the invalidity of the per- "sonal judgment," etc, etc.

In Dewey *v.* Des Moines, the plaintiff-in-error sought to raise a second Federal question, but the basis of this second question was a claim of distinct independent relief, viz., a right to immunity from a special assessment on the ground that such assessment was a deprivation of property without due process of law. The admitted Federal question was the validity of a personal judgment.

In our case, the constitutional point merely adduces another ground for the immunity claimed under the treaty —the two connected points are simply two grounds for the same relief.

The question, being an enlargement of the one before the lower Court, or, even better, being *but another ground* for alleging the invalidity of the decision made by the lower Court, the assignment is sufficient to permit the question to be raised and argued. The Federal question raised in Dewey *v.* DeMoines, as to the assessment upon property was a point totally distinct from the Federal question which was unmistakably raised. The reasoning of the case, however, makes it manifest that if the facts of *that* case had been as the facts in the present are—this Court would not

have refused to permit the other Federal question to be raised.

Had the treaty been given its full force and effect by the California Court, and been properly applied, full faith and credit would have been given to the judicial records and public acts of Hawaii, and the same result would flow from the application of the Constitution.

The Company had the protection of the treaty, and when the Constitution went into effect it had the additional protection of that Supreme Law which was operative in the same general way and on the same general grounds.

Under the treaty this Company claimed protection. Similar protection is claimed by the Constitutional provision which went into effect *after* the case was submitted to the California Court.

The Constitutional point was foreshadowed in our brief in the Supreme Court of California (see Rec., p. 56).

The controlling importance of the treaty *depends* upon the *Constitution* of the United States. Art. VI. is

> "2. This constitution and the laws of the United "States, which shall be made in pursuance thereof, "and all treaties made, or which shall be made, under "the authority of the United States, shall be the su- "preme law of the land; and the judges in every State "shall be bound thereby, anything in the constitution "or laws of any State to the contrary notwithstand "ing."

When the Company claimed the protection of the *Treaty* it claimed the protection of the *Constitution*. When the Constitution was extended to Hawaii while the California Court had the case under advisement, the Constitutional points were added to the Treaty points, by operation of law, for the California Court was bound to take judicial notice of the Constitution as the Supreme Law.

The divorce decree and the administrators' judgment

were pleaded by the Company in the California suit, and as soon as the Constitution was extended to Hawaii the Company was entitled by such pleading to its protection.

As we said above in Point I this Court has frequently taken jurisdiction where the judgment of a *sister State* is pleaded as *res adjudicata* in the State Court, although *no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.*

That is, the *pleading* was a sufficient compliance with the clause in § 709, "specially set up or claimed." Thus in Bell *vs.* Bell, 181 U. S., 175, the defendant pleaded the judgment for divorce in Pennsylvania, but did not otherwise specially set up or claim any right under Const., Art. IV, *and this Court took jurisdiction.*

See also the late case of Sweringen *vs.* St. Louis, 183 U. S., 45, cited above in Point I.

Also Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, on page 142, as follows:

"If the Courts of this country, and especially this "Court, can be supposed to take judicial notice of any- "thing without pleading it specially, it is the Constitution "of the United States. And if plaintiff and defendant in "their pleadings make a case which *necessarily comes* "*within some of the provisions of that instrument*, this "Court surely can *recognize the fact* without requiring "the pleader to say in words: 'This paragraph of the "'Constitution is the one involved in this case.'"

The record shows that the public acts of Hawaii had an effect there not given them by the California court.

Lloyd *vs.* Matthews, 155 U. S., 227.

POINT IV.

The opinion of the Supreme Court of California impliedly referred to the Federal question. This point, taken in connection with the others showing that the Federal question was sufficiently claimed and set up is conclusive against the motion to dismiss.

The defendant in error claims the words "by comity" in the opinion of the Supreme Court show that the latter were not considering a right claimed under the treaty or Constitution. But it is manifest that just here the Court expressly denied the treaty and constitutional rights of plaintiff in error, The Court, referring to the Hawaiian decree, says it was "a decree which could not have been "obtained here; and rested upon an Hawaiian statute which has "no force here except by comity." That is, the Court recognized that the Mutual Life was claiming that the Carter judgment founded upon the decree of divorce involved necessarily the statute, and that the statute controlled the disposition of the case in California by virtue of the treaty and Constitution, but the Court said no, the statute has no force, by treaty or Constitution but only by comity, and therefore does not affect the result (see also Point I above.)

"Any allusion to it (the Federal question) in the "opinion of the Supreme Court" is sufficient. Johnson *vs.* New York Life, this court, January 5, 1903.

The plaintiff in error claims that by virtue of certain treaty obligations between these two countries and the extension of the Constitution of the United States, the Court of California was obliged to follow the decision of the Court of Hawaii, and that the facts presented show the precise contingency to which the treaty and Constitution

were intended to apply. But it would be immaterial even if the treaty and Constitutional questions were not referred to in the decision of the State Court. A treaty and Constitutional right "may be denied as well by evading a "direct decision thereon as by positive action."

Chapman *vs.* Goodnow, 123 U. S., 540, 548.
Des Moines Nav. Co. *v.* Iowa Homestead Co., 123 U. S., 552, 555.

This case was in form decided below on the question, where are the goods? By deciding that Alphonsine could change her domicil *pendente lite*, with the effect of withdrawing her *choses in action* from Hawaii and the jurisdiction of its Court, the Supreme Court of California decided that the goods were not in Hawaii either when the decree of divorce or the judgment of Carter were obtained.

The contention of the Company was that the goods were in Hawaii at both times, and that because of that fact it was entitled to the benefit of the provision of the treaty; that the rights of the rival claimants should be determined by the law and judges of Hawaii, and to the protecting effect of such determination against a second payment of the policy.

The Supreme Court of California cannot avoid the Federal question by holding that the facts do not present a case within the purview of the treaty. This Court will examine the case to see if the Federal question is really involved, even if it be necessary first to decide the preliminary question, where the goods really were, and where was the *situs* of the policy when the decree of divorce and the Carter judgment were obtained. The case is analogous to one in which this Court will examine the question whether a contract exists, preliminarily to the question

whether or not the obligation of a contract has been violated by a State statute.

It is well settled, that raising the Federal question for the first time in the Appellate State Court, if it be there considered, or necessarily involved in the decision, gives the right of review in this Court.

Missouri Kansas &c., Ry. Co. *v.* Elliott, 184 U. S., 530 (decided March 10th, 1902) where Mr. Justice WHITE, delivering the opinion of the Court, uses the following language, on page 534:

"So controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state Court, that it has been *held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet when a question is thus raised and it is actually considered and decided by the state court, the right to review exists.*" *Citing Mallett* v. *North Carolina, 181 U. S., 589, 592.*

In Erie R. R. Company *v.* Purdy, 185 U. S., 148 (decided April 7th, 1902), Mr. Justice HARLAN, delivering the opinion of the Court, says, on page 153:

"If the *highest court* of the state, by *its final judgment,* * * * *denies a right*, privilege or immunity specially set up or claimed *in that court for the first time* under the constitution *or any treaty*, statute or authority exercised under the United States, this court could review that judgment, *although no Federal question was distinctly raised or insisted upon in the trial court.*"

In Maxwell *v.* Newbold, 18 How., 511, 516, the rule is stated to be that although the questions raised and decided in the State Court make no reference to the constitution or laws of the United States, yet "This did not preclude the plaintiffs in error from raising the point in the *Supreme*

Court of the State if it was involved in the case as presented to that Court."

See also Mallett *v.* North Carolina, 181 U. S., 589, 592.

That is, the Federal right being "necessarily involved" in the claim made before the Appellate Court, and in the decision of that Court, that is sufficient to give this Court jurisdiction to review that decision.

If the mind of the State Court is directed to the fact that a right protected by the treaty is relied upon it is sufficient.

Eastern Building Assn. *vs.* Welling, 181 U. S., 47.

In the last cited case the mind of the Court was not so directed in the petition for rehearing, which is not our case.

In the last case referred to this Court held it was sufficient for the Federal question to be raised in the petition for rehearing provided the State Court considered such Federal question.

POINT V.

The Federal question was presented a second time to the Supreme Court in the petition for rehearing which was denied, and such decision necessarily involved a second consideration of the Federal question by the State Court.

The Insurance Company, within twenty days after the above-mentioned decision of the California Supreme Court, and on March 20th, 1901, filed in the said Cali-

fornia Court its petition for rehearing (Record, fol. 199). In that petition for rehearing, among other things it was distinctly claimed that an extra territorial effect should be given to the Hawaiian statute and that the decision of the Hawaiian Court was controlling, *by reason of the treaty.* This will be seen at Record, fol. 210, as follows:

"If, then, there was anything in the laws of Hawaii "which stated that the *lex domicilii* should not govern "in cases of this character, it must follow that the fic- "tion of plaintiff's rights in this policy following her "to California does not apply.

"We claim that there did exist such a provision in "the laws of Hawaii, as must appear at once from the "reading of the treaty rights then existing between the "United States and that country, where it was pro- "vided:

"'If the question should arise among several claim- "'ants as to which of them said goods belonged, the "'same should be decided finally by the laws and "'judges of the land wherein the said goods are.'

"This treaty is as much a part of the law of the "State of California as its own local law and constitu- "tion.

Hauenstein *v.* Lynham, 100 U. S., 483.

"Therefore the decision of the Hawaiian court in Carter "*v.* Mutual Life is controlling, because it is the decree of "a court where the 'goods were.'"

The Supreme Court of California denied the Insurance Company's petition for a rehearing on March 29, 1901 (fol. 223. Also at fol. 199).

That was a decision in which the Court again denied to the insurance Company, this plaintiff in error, its rights claimed under the treaty then called to the attention of the Court.

In the McGrew case the petition for rehearing raised fully the Federal questions and the Supreme Court of

California necessarily considered them in denying such petition, and the Supreme Court of California did not decline to pass upon them.

It has been held in the Mallett case (Mallett *v.* North Crolina, 181 U. S., 589), to be sufficient to retain a case upon the docket of this Court if the Federal question was raised for the first time by a petition for rehearing, provided the State Court in denying the petition for rehearing noticed the Federal question and passed upon it.

An inspection of the opinion of the State Court in the Mallett case shows that the discussion of the Federal question raised by the petition for rehearing was embraced in six lines of print and consisted of a terse statement of the point, a denial of its appositiveness and the citation of a single authority in support of the Court's view. The discussion would have been but little less brief had it been confined to the formula "petition denied."

On principle it would seem that the right to maintain the writ of error in the pending case would be the same. When the litigant has squarely presented the Federal question and its decision is fairly and necessarily involved in the issue, he has done all that can reasonably be required of him and the failure to provoke the State Judges into a discussion of its merits of greater or less length cannot have been intended by this Court as a logical standard by which to measure his right to maintain his writ of error here. Otherwise a hostile State Court could defeat this Court's jurisdiction by simply omitting express reference to the federal question. This Court has repeatedly said it would not tolerate any such attempt.

In the case at bar the judgments of the State Courts against the company could only have been reached as the result of the denial of the effect claimed for the Hawaiian judgments and statute under the treaty and Constitution. As it is the law of the land that Courts shall first hear and then upon consideration determine, it must be presumed

that the company's defense was carefully though erroneously weighed, and no discussion of it by the State Court, however elaborate, could have disposed of it more effectually than the words "motion denied."

This brief determination is not equivalent to "motion dismissed" without consideration but it involves judicial action on the merits of the matter presented.

Thus in Chapman *v.* Goodnow, 123 U. S., 548, this Court says:

"*We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused.*"

In Michigan Sugar Co. *v.* Michigan, 185 U. S., 113, the Court says:

"The Supreme Court of the State did not refer to the "Federal Constitution or consider and decide any Federal "question. For aught that appears, the Court proceeded "in its determination of the cause without any thought "that it was disposing of such a question.

"The rule is firmly established, and has been frequently "reiterated, that the jurisdiction of this Court to re-"examine the final judgment of a state court, under the "third division of section 709, cannot arise from mere "inference, but only from averments so distinct and posi-"tive *as to place it beyond question that the party bring-"ing the case here from such court intended to assert a "Federal right.*"

There can be no doubt in the cause at bar of such intention.

Rothschild *v.* Knight, 184 U. S., 339, 341.

Mr. Justice McKenna:

"A motion is made to dismiss the writ of error upon "the ground that no federal question was raised in the "Superior Court. Federal questions were raised, how- "ever, on writ of error to the Supreme Court, and that, "we think, was a sufficient claim."

See also

King *v.* Cross, 175 U. S., 396.
Chicago, Rock Island & Pacific *v.* Sturm, 174 U. S., 710.

It cannot be said that in this case the State Court declined to pass upon the Federal questions distinctly raised by plaintiff in error both before judgment and in the petition for rehearing without considering them, for it was necessary for the State Courts to have considered such questions if it considered the case at all.

The insurance company, the plaintiff in error, has already discharged the full measure of its obligation upon the policy in question, as the result of the decree of one Court of competent jurisdiction. It remains for this Court to say whether it shall again be required to pay the amounts called for by the policy because the California Courts, ignoring its pleas in bar and its Treaty and Constitutional rights and rejecting evidence offered in support thereof, has so decreed.

The federal question is thus clearly and distinctly presented by the record.

It would be preposterous therefore to claim that the Federal questions both under the Treaty and the Constitution, which exist in this record, are so clearly without color or foundation that this Court is without jurisdiction of this case, which is the test that has been repeatedly laid down by this Court.

POINT VI

Questions arose among several claimants, namely, Henri G. McGrew by his guardian, Charles L. Carter, Alphonsine McGrew, J. O. Carter, administrator of the estate of Henri G. McGrew, deceased, as to which of them said policy belonged, and the same were decided finally by the laws and judges of Hawaii, wherein the said policy was.

The decisions were that the policy belonged to Henri McGrew and his estate and the California court was bound under the treaty by the law as laid down by the Hawaiian judges and their decisions, and under the Constitution of the United States was bound to give full faith and credit to the divorce decree, the public act of Hawaii in regard to the effect of such decree, and the judgment in the administrator's action.

The contest in California was whether the administrator for the benefit of the infant son or the divorced mother was entitled to the proceeds of the policy. The California Court did not pretend that the company, as a matter of law, should pay twice. The California Court said, "The fact that appellant paid the policy to the wrong "party, would be no defense to an action brought by the "right party" (Rec., 97). The company claims here that, under the Treaty and Constitution, it had been finally decided by the Hawaiian law that the administrator was enti-

tled to collect the policy, and that the California Court was bound by said Hawaiian law. Any litigation involving the title to the policy comes within the operation of the treaty and must have been decided by the law of Hawaii where the goods were.

The policy had a *situs* of its own, but in any and every aspect of the case it was in Hawaii when the divorce suit was commenced, and continued there for the purposes of that action in view of the personal service on Alphonsine. She could not divest the jurisdiction of that Court over her personal property by leaving Hawaii, and the continued presence of the policy in Hawaii enabled the divorce decree to become effective by which, in virtue of the statute, the policy was vested in the husband.

When the divorce suit was commenced the goods, that is the policy, were in Hawaii, and both Henri and Alphonsine were domiciled in Hawaii, and the policy being a Hawaiian contract could have been enforced there against this Company.

Under every aspect of the case, therefore, the goods were *at that time* in Hawaii. They continued in Hawaii. The divorce suit was a proceeding *in rem* against the personal property of Mrs. McGrew as well as a proceeding in *personam*. The jurisdiction of the Hawaiian Court once attaching to the policy continued until final decree, and was not divested by Mrs. McGrew's removal to California, after service of process upon her in Hawaii. By the final decree in the divorce case, the policy remaining in Hawaii, its *situs* was there fixed by the adjudication that it was the property of Henri McGrew. That *situs* remained until his death, and the policy remaining there, it passed to the administrator Carter, and was "goods" in Hawaii where Carter sued the Company and recovered judgment.

This treaty is the Supreme law of the United States,

and is as much a part of the law of the State of California as its own local laws and constitution, and the judges in that State are bound thereby.

The decisions of the Courts of Hawaii and performance by this plaintiff in error as decreed by the judgments of those Courts protect it and give it "immunity" from further suit on the policy in any Court of any State of the United States.

The fundamental error made by the Supreme Court in California was, in deciding "that the Hawaiian Statute had no operation upon" the plaintiff Alphonsine or her "personal estate here" for the reason that "at the time when such statute could be invoked * * * she was domiciled in California," and that "the law which governs personal property is the law of the domicile" (see Record, fol. 194). The Court thus held that, the general rule that all personal property is in the place of the domicile of the owner, was applicable, and that the laws and decisions of the *Courts of California* should determine the claim of Alphonsine to this personal property, because that was Alphonsine's domicile, and consequently that was the place where the "goods are." The Court thus refused to give any force to the scope and effect of the treaty, and further, entirely ignored the constitutional provision that full faith and credit should be given to the two judgments in Hawaii.

The treaty was intended to protect all persons including corporations doing business in Hawaii. The plaintiff-in-error, therefore, can invoke its protection with respect to its business done in Hawaii and this policy issued there. It can therefore claim that the respective rights of the claimants to the policy and its proceeds shall be decided by the laws and the judges where the goods are. In making this claim, the plaintiff-in-error is standing upon its own rights under the treaty, and not setting up the right of another under the treaty. The question:

where the goods are, may, but does not necessarily depend upon the effect of the attempted change of domicil of respondent-in error during the pendency of the divorce suit. It is obvious either that her domicil continued in Hawaii where her husband resided, until the decree of divorce was pronounced, or that she could not change her domicil pending the suit so as to defeat her husband's inchoate rights obtained by their residence in Hawaii and his filing the bill of divorce, which rights were, to have the statute operate so as to vest in him, the personal property on her conviction of adultery, by the decree. If the decree of divorce and her change of domicil were simultaneous, the vesting of the policy in the husband was also simultaneous, because the statute was, by force of law, part of the bill for divorce, and of the decree with equal effect, as if it had therein been fully set forth and reviewed.

So soon as it appears that the goods, the policy in question, were in Hawaii, when respondent-in-error brought her suit in California, it also appears that the Company has the right to have the claimant's rights decided by Hawaii law. The Company, being obliged to pay the rightful claimant, is most deeply interested in being protected against paying the wrongful claimant, and has a right to invoke the treaty to establish this protection. The judgment in Hawaii was not conclusive against defendant-in-error as *res adjudicata*, but was evidence of the view the judges of Hawaii took of the effect of the statute upon the decree of divorce and the ownership of this policy, and as such was administered as proof of the law of Hawaii. The opinions, however, of the Supreme Court of Hawaii, which were admitted in evidence, sufficiently show that the law of Hawaii was that the policy in question was the property of the estate of the husband.

The judgment of Carter was, however, material and

relevant as showing payment by the Company of the policy in accordance with the rulings of the Hawaii Court with respect to the rights of the respective claimants.

I.

(1.) The General Object of the Treaty.

The general object of this particular clause of the treaty was to provide that the laws and judges of the land wherein the goods were, were to decide finally to whom they belonged in any controversy as to their ownership. The broad scope of the treaty was that if any question arose in the Courts of either country where the goods were between subjects or citizens of the respective countries, the decision of the Courts of that country, whichever it might be, should be final.

A clause similar to the one in the treaty between the United States and Hawaii has been quite usual in other treaties of the United States, and specimens of treaties containing similar clauses have been printed in an appendix to this brief, together with the corresponding foreign versions. The legal situation from a historical point of view was briefly as follows, and it is to be considered in its two aspects (1) the laws, or the *lex rei sitæ*, and (2) the judges, or the *forum rei sitæ*.

(*a.*) *The Lex rei sitae.*

After the barbarian invasions and the break-up of the Roman Empire, the system of personal law became prevalent. Under this system the rights of an individual were determined by his tribal law. He carried this law with him wherever he went. His domicile played no part whatever in determining what law should be applied when

litigation arose. The rule grew up that the defendant should defend himself in his own courts and by his own law. (Bar, International Private Law, 2d Ed., Sec. 14).

In the later middle ages the system of personal laws disappeared. As a general rule a man could be sued for debt in the place where he lived, and so the law of the debtor's domicile decided claims of debt (Bar, §15). This is an early application of the rule of *lex domicilii*. The *lex domicilii* came to prevail as to successions only after long conflict with *lex rei sitae*, and even after it was recognized as the general rule it was subject to many and important exceptions. *The present tendency is to enlarge the exceptions.* In several important countries of Europe, the *lex domicilii* has given way to the *lex ligeantiæ*, or national law (see Weiss, Droit International Privé, Tome 4, p. 508). The theories of the maxim, *Mobilia personam sequuntur*, have been various, viz.: (1) that goods formerly accompanied the owner, as he had power to bring them to his domicile; (2) that goods actually away from the owner's domicile are merely *branches* of his general mass of property which has its *root* at his domicile (Weiss, Dr. Int. Priv., t. 4, p. 163); (3) that a person acquires a power of *attraction* over things (Holzschuber, referred to by Bar, §222); (4) a mere extension of one's personality (Holland, on Jurisprudence 9th, ed., 178).

In matters of succession England and the United States apply generally the *lex domicilii*, while Germany and Italy apply the national law (or *lex ligeantiæ*).

See Bar, Priv. Int. Law, Sec. 365.

One of the clearest statements of the divergent laws applicable is the following by Despagnet:

"Les législations étrangères se partagent en quatre "catégories: 1° Celles qui appliquent à la succession "immobilière la loi de la situation, et à la succession

" mobilière celle du dernier domicile du défunt, comme " en France, ou, parfois, la loi nationale : Belgique, " Autriche, Roumanie, Hollande, Monaco, Angleterre, " Suède, Pérou, Mexique ; 2° Application à tous les biens " de la succession, meubles et immeubles, *de la loi de la* " *situation :* Russie ; 3° Application à tous les biens, " mobiliers et immobiliers, de la loi du dernier domicile " du de cujus : République Argentine, Chili ; 4° Applica- " tion de la loi nationale du défunt à tous ses biens : " Allemagne loi d'introduction au nouveau Code Civil, " Art 24 et 25, remplacant l'ancienne loi du domicile ; " Italie, Espagne, Serbie, canton de Zurich."

[Despagnet Droit International Privé 3rd Ed., p. 683].

This question of the proper law applicable was so important and the necessity for a uniform rule on the subject so great, that it was one of the subjects of the second conference at The Hague in 1894 on the subject of private international law and in the Final Protocol the delegates agreed to submit to their respective governments the principle that the law which should prevail should be "loi national du defunt" (See the original report of the conference of 1894).

In view of the above and other divergent rules and theories, there was a clear reason for the regulation of the matter by treaty, and it has been regulated by treaty in many cases.

In these treaties the words "personal property," whether tangible, or intangible, are identical with the words "goods," and in all these treaties the supreme law of the United States is that any question that may arise as to the rightful ownership of personal property, shall be finally determined by the Judicial Tribunals of the country in which they are *actually* situated ; that is, the ***lex rei sitae*** shall govern, ***and not the lex domicilii.***

The theory adopted by the Treaty is sanctioned by the highest authority (Rattigan, p. 81).

"And the third theory is to apply the *lex loci rei sitæ* "to moveables as well as immoveables. This is the theory "advanced by Grotius, and Fiore, and Asser-Rivier, and, "with certain modifications, is practically adopted by Bar "as supplying the only true law that can be applied, and "and resting upon the intolerable inconvenience of any "other doctrine."

(*b.*) *The "judges" or forum rei sitae.*

Holland says that given a set of circumstances the legal consequences of which are disputed, it obviously becomes necessary to ascertain in the courts of what country the dispute can be decided, in other words, what court has jurisdiction to try the case *ratione territorii.*

He then says that the possible forum may be "that of the country in which the plaintiff, or the defendant, is domiciled, or to which he owes allegiance (*forum ligeantiae*, or *domicilii*, *actoris*) or in which the defendant happens to be (*forum ligeantiae. domicilli*, or *praesentiae, rei*) ; *that of the country in which the object in dispute is* (*forum rei sitae*) ; that of the country in which the juristic act in question, which may have been for instance a marriage, or a sale, or the making of a will, took place (*forum, actus, contractus*) ; that of the country in which the wrongful act in question took place (*forum delicti commissi*) ; that of the country in which a contract was to produce its results ; or that in which the plaintiff chooses to commence proceedings (*forum litis motae* or *fortuitum*) (Jurisprudence 9th Ed. 387).

Now it was the object of the treaty to declare what shall be the forum and it was agreed that if a question arose among several claimants as to which of them goods belonged, the judges of Hawaii should have exclusive jur-

isdiction ("decided finally"), provided the goods were in Hawaii, and that is what is claimed in this case.

(2.) THE LAWS AND JUDGES OF HAWAII HAD UNDER THE TREATY POWER TO DECIDE FINALLY TO WHOM THE POLICY BELONGED, BECAUSE THAT WAS THE LAND WHEREIN THE GOODS WERE.

(*a.*) *The policy was covered by the word "goods" in the treaty.*

It is claimed by the defendant in error that the term "goods" as used in the treaty does not cover a chose in action, but refers only to tangible personal property.

As a matter of fact, the "goods" were in Hawaii when the action for divorce and the action against the Mutual Life there were begun.

The word "goods" in the treaty is a word frequently employed in treaties and corresponds to the word "biens." This word "biens" includes *all* personal property.

This French word "biens" is used to include a policy. Thus in the report of a case in the Journal du Droit International Privé, Vol. 22, 1895, p. 369, the report says: "La police, comme d'autres polices concues dans les mêmes termes, fut mentionée dans l'inventaire *à titre de bien hereditaire*" etc. (was mentioned in the inventory under the title of inheritable goods).

The particular words in the treaty are used as synonymous with personal estate, as a reference to preceding paragraphs will show, *e. g.*: "They shall be entitled to dis-
"pose of their *personal property of every kind and descrip-*
"*tion*, by sale, gift, exchange, will, or in any other way
"whatever, without the smallest hindrance or obstacle; and
"their heirs or representatives being subjects or citizens
"of the other contracting party shall succeed to their
"personal goods, whether by testament, or *ab intestato*,

"and may take possession thereof, either by themselves or "by others acting for them and dispose of the same at "will, paying to the profit of the respective governments "such dues only as the inhabitants of the country wherein "the said goods are shall be subject to pay in like cases."

The term "personal goods," which the treaty deals with, must *include* all of one's personal estate, because it could not be intended to *exclude* the right of disposing of or succeeding to such property as policies, stocks, bonds, choses in action, etc. For this would exclude by far the greater portion of the property of the individual, and it is a general rule in the construction of treaties that a *liberal and not a restrictive construction of the rights to be claimed under it should be followed.*

Shanks *v.* Dupont, 3 Pet., 242.
Hauenstein *v.* Lynham, 100 U. S., 483, 487 and cases cited.

Mr. Justice BROWN has, in the very recent case of Tucker *v.* Alexandroff, 183 U. S., 437, expressed this rule fully and forcibly:

"We think, then, that the rights of the parties must be "determined by the treaty, but that this particular con- "vention being operative upon both powers and intended "for their mutual protection, should be inter- "preted in a spirit of *uberrima fides*, and in "a manner to carry out its manifest purpose. Taylor on "International Law, Sec. 383. As treaties are solemn en- "gagements entered into between independent nations for "the common advancement of their interests and the inter- "ests of civilization, and as their main object is not only to "avoid war and secure a lasting and perpetual peace, but "to promote a friendly feeling between the people of the "two countries, they should be interpreted in that broad "and liberal spirit which is calculated to make for the ex- "istence of a perpetual amity, so far as it can be done "without the sacrifice of individual rights or those prin- "ciples of personal liberty which lie at the foundation of

" our jurisprudence. It is said by Chancellor Kent in his " Commentaries (Vol. 1, p. 174): 'Treaties of every kind " 'are to receive a fair and liberal interpretation according " 'to the intention of the contracting parties, and are to be " 'kept with the most scrupulous good faith. Their mean- " 'ing is to be ascertained by the same rules of construction " 'and course of reasoning which we apply to the interpre- " 'tation of private contracts.' "

If the word "goods" in the treaty was limited only to purely tangible or strictly corporeal personal property then it necessarily follows that the treaty, where it provides that disposition can be made of personal property by sale, gift, exchange will, or in any other way, and succession shall be to *personal goods*, whether by testament or *ab intestato*, and possession may be taken "thereof by themselves or others acting for them, and dispose of the same at will," refers only to strictly corporeal property like a watch or piano, and not to policies, bonds, stocks, etc., and that the treaty gives no protection to subjects or citizens of either country claiming title or succession to bonds, policies of insurance, stocks, etc., and gives them no right of disposition of the same.

The particular paragraph in question then proceeds: "And if a question should arise among several claimants as to which of them *said goods* belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are."

Thus the word "said" being referred to, its proper antecedent shows that it was the intention of the contracting parties to include by the term "goods" all the personal estate of the individual. That this view is correct is clearly shown by the clause in the Treaty "paying to the profit of the respective Goverments such dues only as the inhabitants of the country *wherein the said goods* are shall be required to pay in like cases." Under this there can be no doubt that dues if payable would be pay-

able on a policy actually within one of the jurisdictions. The Inheritance Tax Law of Hawaii refers to "property" "within this Republic." Session Laws Hawaii, 1892, Ch. CVI, Section 1. See also Civil Laws 1897, S. 910.

This view is sustained by the fact that the treaty then proceeds to pass upon rights in real property, it being the evident purpose to provide for rights in all property, personal and real.

The term "goods" is by no means limited to strictly tangible moveables such as ordinary chattels, but in many cases it has been held to include such choses in action as policies, bonds, etc.

Thus, the word "goods" in the Statute of Frauds has frequently been held to include these.

See Dowdel *vs.* Hamm, 2 Watts, 61, 65, where the Court said:

> "The words 'goods' is '*nomen generalissimum*', and "when construed in the abstract the term will embrace all "the personal estate of the testator, bonds, notes, money, "plate, furniture, etc."

Tisdale *vs.* Harris, 20 Pickering, 9;
Greenwood *vs.* Law, 25 At. Rep., 134;
Terhune *vs.* Bray's Ex., 16N. J. Law, 53.

No good reason can be suggested for holding that this treaty intended to affect questions relating to the title to strictly tangible personal estate, but to no other personal property, and, therefore, the word "goods", taken in its general sense, must include this insurance policy.

No *reason* has been shown why in this 8th clause of the treaty there should be a distinction made between strictly tangible personal property and chattels such as policies, bonds, etc., nor does counsel cite any *authority* for such a distinction. It is merely based on a claim that a "*restrictive*" and not a "*liberal*" construction should

be placed on the treaty, which claim is contrary to the rule of construction adopted by this Court.

The counsel for the defendant in error in claiming that this insurance policy theoretically moved with Alphonsine when she went to California claims that the word "goods" refers only to strictly tangible property, and he cites the case of Kirtland *vs.* Hotchkiss, 100 U. S., 491, 493, which decides only that a

"debt, although a species of intangible property, may, for the *purpose of taxation*, * * * be regarded as situated at the domicile of the creditor," and that a "bond, wherever actually held or deposited, is only evidence of the debt."

This is true only on a question of the location of property of this class for the purpose of taxation under statutes that distinctly and by terms subject such property to taxation at the domicil of the owner. In New York bonds were uniformly held taxable where they were located, until a statute was passed subjecting them to taxation at the domicil of the owner.

(*b.*) *The phrase "wherein the goods are" cannot possibly refer to the domicile of the owner, but refers to the actual situs of the property and its physical location.*

"Goods" such as policies can have a location, and the test of "wherein the goods are" cannot possibly be the owner's domicile, for "ownership" is the very issue referred to in the treaty. If this were not the case the treaty would ineffectively read that if a question arises as to whom the goods belong, it shall be finally decided by the courts of the domicile of the claimant to whom they belong, which is a *reductio ad absurdum*.

This is pointed out by Rattigan in his work on Private International Law, Ch. IV., page 81, where he says :

"But this theory is open to the double objection that "it is, in the first place, altogether illogical to attempt "to determine disputed rights in moveables by the law "of the domicil of one of the parties concerned, for the "title can only be settled by the decision itself, and to in-"voke the law of the owner's domicil in order to arrive at "that decision is to proceed in 'a vicious' style, which "obviously leads to no practical result; and, in the next "place, as the owner's domicil may often be widely re-"moved from the place where the moveable in dispute is "in fact, it would seem to be unreasonable, in such a case "at all events, to decide who is the owner of the thing "with reference to a law which cannot give the possession "of that thing."

The *situs* of the goods was in Hawaii, either because their actual location was there, or because they were enforceable there against the debtor, The Mutual Life.

It is necessary, of course, to determine what law is referred to. In order to do this, it is necessary to determine "where the goods are" within the meaning of the treaty. We will show that the words can refer, either, firstly, to the law of the place where the goods actually are, or, secondly, to the law of the place where the policy could be enforced.

The words "land wherein the goods are" can refer to Hawaii, where the policy actually was.

No objection could be taken to this position so far as strictly tangible property is concerned, nor in the case of this policy, which is the only property before the Court, can it be claimed that a different interpretation applies.

A policy of insurance *may be* separated as to its *situs* from the domicile of its owner by the treaty.

It is perfectly well settled that a policy of life insurance is assets where found, for purposes of administration, and the actual situs of the policy itself is material in determin-

ing whether Courts have jurisdiction and exclusive jurisdiction in an action by an administrator.

In the very recent case of Equitable Life *vs.* Brown, decided by this Court Dec. 1, 1902, it was held that a life insurance policy in Hawaii had a situs there, and that the Hawaiian administrator was entitled to collect the policy, following the case of N. E. Life *vs.* Woodworth, 111 U. S., 138.

See Sulz *vs.* M. R. F. L. Assn., 145 N. Y., 563, cited in the Brown case.

Wyman *vs.* Halstead, 109 U. S., 654.

The learned opinion of Mr. Justice McKenna in Chicago, etc., R. R. *vs.* Sturm, 174 U. S., 710, is against the use of the artificial considerations, fictions and refinements of the doctrine of situs to work injustice such as is attempted here.

For some purposes the domicile of the owner is deemed the *situs* of his personal property.

This is a legal fiction, not of universal application, and may be changed at will by constitutions, treaties and statutes.

The only question is, was it the intention of the treaty to make the *lex rei sitæ* apply? We show below that it could not have been the intention of the treaty to refer to the land of the owner's domicile; hence it must have reference to the actual *situs* of the policy in Hawaii which was the place where the policy was and where it could be enforced.

In the appendix the version of this clause in the foreign languages is expressly quoted to show that such language is in harmony with this notion of an actual *situs*.

Holland in his Jurisprudence (Ninth Ed.), at p. 391, says:

"The possible law may be that of the country to which

"one of the persons concerned owed allegiance (*lex ligeantiæ*), or in which he is domiciled (*lex domicilii*), *or in which the thing in question is situated* (*lex loci rei sitæ*), "or in which the wrong in question was committed (*lex loci delicti commissi*, or in which an act, such as the making of a will or of a contract, was performed (*lex loci actus*), of which contractus is a species, or in which a "contract was to be carried out (*lex loci solutionis*)."

It is perfectly evident that the treaty selected not the *lex domicilii*, but the *lex loci rei sitæ*.

It is only necessary to show, therefore, that goods, such as insurance policies, bonds, notes, etc., *can* in law have a location independent of the domicile of the owner. This is elementary. The *lex rei sitæ* may apply to such property as well as to strictly tangible property, as to which text writers make no distinction. Wharton refers to public loans, railway bonds and other securities in Sections 305, 306 and 307 as coming under the rule (Conflict of Laws). He says as follows:

"As to such movables, *situs* is as necessarily the arbiter "as is the case with immovables" (Sec. 307).

(c.) *It is impossible for the meaning of the treaty to be that if a question arises as to which claimant goods belong, which is to be decided finally by the laws and Judges of the land wherein the said goods are, that said goods shall be deemed to be in the land which is the owner's domicile.*

This contention and the decision of the Court in accordance with this view completely nullifies the treaty. There would be no necessity of the provisions in the treaty "that the laws and Judges of the land wherein the said goods are" should be decisive of any question arising among claimants to the goods, unless the words "land wherein the said goods are" mean where they *actually* are and not where they are according to some legal fiction. The cases

cited in the opposing counsel's brief as to the rule that "intangible personal property has no *situs* apart from the domicile of the owner" are cases *where no treaty or other "supreme law" constitutional or legislative has provided otherwise*. In the case at bar, the treaty provides, in effect, that change of domicile, *by itself*, shall not affect the situs of personal property. That is, that in order to change its *situs* it must be actually taken from one country and actually located in the other. Although personal property by "fiction of law" is sometimes for some purpose deemed to follow the owner, yet this treaty in effect says that when a dispute arises as to the ownership of personal property the same shall be decided by the law of the land wherein the personal property *actually is situated irrespective of the residence or domicil of the claimants*.

The treaty referred to controversies between subjects or citizens of the respective states, and it was not the domicile of either that was in mind, but the location of the goods. The subject of the United States might be governed by the laws of Hawaii or the United States, according to where the goods actually were, and so with the subject of Hawaii.

That is, *by virtue of this Hawaiian treaty*, the law which governs this policy and the claims and rights thereunder, *is not*, as the California Court held, "the law of the domicile" (Record fol. 194), but as the plaintiff in error claims, the law "*rei sitæ*."

If it were not for the treaty, then in any controversy as to personal property, actually located in either country, to which a citizen or subject of either country might be a party, a "vexed question" would arise as to whether the *lex domicilli* or the *lex rei sitæ* should control. As a question of international law, irrespective of treaty, this is a "vexed question."

This Court in Green *vs.* Van Buskirk, 7 Wallace, 139, 150, in speaking of

"The fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located" says: 'this fiction is by no means of universal application,' and as Judge Story says, 'Yield, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined.'

And again, (at pages 150 and 151):

"We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a *vexed question*, on which learned courts have differed; but after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. *And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer than that of the State where the owner lives.*'"

The United States had *power* by the treaty to declare that the law of the domicile should not govern, and it is merely a question *of what was the intention.*

This is fully recognized by this Court.

In the following case (Eidman *v.* Martinez, 184 U. S., 578, 581), Mr. Justice Brown delivering the opinion of this Court refers interestingly to the evolution of the doctrine, and learnedly says:

"The ancient maxim of the law, *mobilia sequuntur* "*personam*, was the outgrowth of conditions which have "largely ceased to exist, and of an age when personal "property consisted principally of articles appertaining, "as the name indicates, to the person of the owner, such "as gold and silver, jewels, apparel, and less immediately

" to horses, cattle and other animals, and to the products " of the farm and the shop. As this property was, in " primitive times, usually kept under the personal super- " vision of the owner, and was often carried about by him " on his journeys, (as it often still is in Oriental countries), " the principle became incorporated in the law that its " locality was determined by the domicile of the owner, " and that his rights with respect to such property were " fixed by the law of that domicile.

" While the enormous increase in the amount and " variety of personal property during the past century " has necessitated certain limitations of the maxim, " particularly in matters of taxation, it is by no means " obsolete. It is still the law that personal property is " sold, transmitted, bequeathed by will, and is descendible " by inheritance according to the law of the domicile and " not by that of its situs."

Cross *vs.* United States Trust Co., 131 N. Y., 330;

Ennis *vs.* Smith, 14 How., 400, 424;

Dammert *vs.* Osborn, 141 N. Y., 564.

* * * * * * serious encroachments have been made upon the ancient maxim. * * *

Green *vs.* Van Buskirk, 5 Wall, 307; S. C., 7 Wall., 139;

Hervey *vs.* Rhode Island Locomotive Works, 93 U. S., 664;

Walworth *vs.* Harris, 129 U. S., 355;

Security Trust Company *vs.* Dodd, 173 U. S., 624, and cases there cited.

"The same principle has been applied not only to tan- " gible property but to credits and effects."

Tappan *vs.* Merchants' National Bank, 19 Wall., 490;

Savings Society *vs.* Multnomah Co., 169 U. S., 421.

New Orleans *vs.* Stempel, 175 U. S., 309.

Bristol *vs.* Washington Co., 177 U. S., 133.

"The question in each case is not of *the power* of the "legislature to tax the personal property of non-residents, "both tangible and intangible, since that is well estab- "lished both in England and America, *but of its intent* to "do so by the particular act in question."

Mager *vs.* Grima, 8 How., 490.
Eidman *vs.* Martinez, 184 U. S., 581.

And in case of New Orleans *vs.* Stempel, 175 U. S., 319, 322, Mr. Justice BREWER sums up broadly the doctrine, saying:

"With reference to the decisions of this court it may "be said that there has never been any denial of the "*power* of a State to tax securities situated as these are, "while there have been frequent recognitions of *its power* "*to separate* for purposes of taxation the situs of per- "sonal property from the domicile of the owner. * * *

"It is well settled that bank bills and municipal bonds "are in such a concrete tangible form that they "are subject to taxation where found, irrespective of the "domicile of the owner; are subject to levy and sale on "execution, and to seizure and delivery under replevin; "and yet they are but promises to pay—evidences of "existing indebtedness. Notes and mortgages are of the "same nature; and while they may not have become so "generally recognized as tangible personal property, yet "they have such a concrete form that we see no reason "why a State may not declare that if found within its "limits they shall be subject to taxation."

Story (Conflict of Laws, Section 379), speaks of it as a "fiction of law," and says, "a sense of general utility must have first suggested the doctrine."

In Sections 383 and 384 he mentions a number of exceptions to this "general rule," and in Section 385, refers to cases where disputes often arise when the laws of the domicile clash with the laws of the place where the property is situated, in which cases the *lex sitæ* governs.

See Minor Conflict of Laws, § 121, *et seq.*

In Wharton's Conflict of Laws, Section 311, the "rule of international law" is thus stated :

"Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs ;* though in some jurisdictions an exception may be made in cases where all the parties being subject to a common domicile, are held to be bound by the laws of that domicile."

The reason being (299):

"That if it is the domicile of the owner which is to decide, it *becomes a difficult and sometimes insoluble question to determine who this owner is.* An action is brought to decide as to the ownership of a chattel. The litigants have different domiciles; and if the article in dispute is to be subjected to the owners domicile, *the question as to who is the owner not being yet decided the suit* has to be stopped at the outset from *inability to determine as to how it shall be tried.* Then, again, if possession be the test, there may be several possessors, or persons claiming to be such, each with a different domicile, from which confusion almost equally obstructive would ensue."

Again at Section 308, he states as follows :

"To movables as well as to immovables applies the position that if the *lex rei sitæ* be not accepted, there is no available decisive law,"

and refers to

" the failure of justice which would flow from application
" of the *lex domicilii* to issues framed to determine which
" of several claimants 'having different domiciles is en-
" titled to a particular article,' and says: 'If the *lex dom-*
" *icilii* is the exclusive judge, there could be no decision
" on any point in which the laws (of the two domiciles)'
" differ, for we would have then a *collision between two in-*
" *dependent systems of law* each supreme with no arbiter
" to decide which is to prevail. Because, therefore, the
" *lex domicilii* (1) involves a *petitio principii*, and (2) is

"from its very nature incapable of deciding an issue be-
"tween two or more claimants of distinct domiciles, we
"must reject it as insufficient for the purposes for which
"it is here invoked. * * * The only alternative, then,
"is the *lex rei sitæ;* and this has the advantage of being
"the law to which the thing litigated is, by the very
"fact of its being deposited on the soil, at least tacitly
"committed by the parties."

The treaty has removed the danger of any collision between independent systems of law.

Both parties to this treaty clearly saw the necessity of avoiding "this vexed question" and of settling upon some uniform rule for the determination of claims to personal property, and they decided that the *lex rei sitæ* should govern *without any regard to the domicile of the claimants.* They clearly saw that any reasons that might exist for the "fiction of law" that personal property followed the domicile of the owner could not properly apply to any claim to the same that might arise between claimants having different domiciles. The treaty, in effect, provides that the ownership of personal property shall not be regarded as following the owner. The domicile of any claimant is absolutely immaterial in determining any claim to such ownership. That is, if personal property be located in Hawaii it shall be regarded as remaining there unless the same is physically and actually taken away and located in another country.

The two nations had agreed on this clause VIII of this treaty in order to avoid a controversy such as has here arisen and in order to make it certain the laws and forum of one country should control.

If this were not the case the treaty would read that if a question arises as to whom the goods belong, it shall be finally decided by the courts of the claimant to whom they belong.

(*d.*) *The goods, that is the policy, were in Hawaii*

and that is the land referred to, because in addition Hawaii was the place where the policy could be enforced.

It is well recognized that the situs of a chose in action may be the place where it can be enforced, and as at all times this policy could have been enforced in the Kingdom of Hawaii, and as a matter of fact, was enforced there, the Treaty could be readily interpreted, so far as this policy is concerned, as referring to the Kingdom of Hawaii. Dicey, on "The Conflict of Laws," says:

"Whilst lands and generally, though not invariably, goods must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor, or other person against whom a claim exists, resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced" (3d ed., p. 159).

"It is clear that choses in action can be collected by suit only in the jurisdiction where the debtor or his property can be reached. This ordinarily has been and will be the place where the debtor resides. It may, however, be any place where legal service of process can be made upon the debtor, or a legal attachment can be made of his property.

As one writer puts it, a chose in action must be considered as situate at the place where it can be effectively dealt with. It is useless to say that a chose in action follows the person of the creditor when the matter in hand is the enforcement of payment of a law suit.

The rules adopted at an early day by the English courts were evidently all based upon the principle that choses in action are to be considered as located in the place where they can be effectively dealt with, *i. e.*, reduced to case. Simple contract debts were held to follow the person of the debtor, and to be *bona notabilia* in the locality where the debtor lived at the decease of the intestate. As administration usually followed close upon the decease of the intestate, and debtors generally were permanent residents, administrators appointed at the places where the debtors resided at the time of the decease of the intestate

apparently found no difficulty in bringing suits in the jurisdiction where they were appointed" (11 Harvard Law Review, p. 101).

(3.) THE ADMINISTRATOR'S ACTION WAS WITHIN THE TREATY AND THE GOODS WERE IN HAWAII.

On the death of Henri McGrew, Carter, administrator, a subject or citizen of Hawaii, and The Mutual Life Insurance Company, a subject or citizen of the United States were parties to a controversy as to whom the policy belonged, it having already been decided in the divorce case.

The divorce was granted in Honolulu August 24, 1894. The policy was then in Honolulu, and by virtue of the decree of divorce it belonged to Henri McGrew, who was domiciled there and a subject and citizen of Honolulu. The contingent interest of Mrs. McGrew had been absolutely cut off by the divorce decree, as much as if she had then died.

Her situation was similar to that of the wife in Brown's Appeal, 125 Pa., St. 3 9, where the children had the interest after her death, the Court saying: "She was the "payee named in the first instance, but the promise to her "was not an absolute and unconditional promise to pay to "her, or to her administrators, executors or assigns, but a "promise to pay her upon condition that she was living "when the policy should fall due. * * * They (the "children) were parties to the contract, as truly as she "was, and have as clear a right to sue upon it, upon the "happening of the contingency that made them the "payees, as she could have had if living."

When Alphonsine moved to California the possession of the policy was still in Henri, and the Hawaiian Court did not lose jurisdiction of her person and her personal

property in the divorce suit. The California Court did not perceive the precise character of her extinguished interest, but simply declared that the law of *her* domicile, which they claimed to be California, controlled, not perceiving that Henri himself had possession and an interest, which was controlled by the law of *his* domicile in the divorce suit and also by the law of Hawaii as the place where the goods were under the Treaty.

A suit was begun by his administrator, Carter, in Hawaii against The Mutual Life Insurance Company of New York, a subject or citizen of the United States, in which suit the question arose between the claimant Carter and the claimant Company (claiming it is true for Alphonsine McGrew, then according to counsel's contention, a subject or citizen of the United States) as to which of them the policy in Hawaii belonged. The Company contested the claim of Henri McGrew (Rec., fol. 15) on behalf of Alphonsine McGrew and claimed the right to retain the monies due as against Henri's administrator. The Mutual Life is a subject or citizen of the United States within the meaning of the Treaty (Janson *vs.* Driefontein Mines, Lim, L. R. App. Cas, 1902, p. 501).

Alphonsine left Honolulu April 5, 1894, taking Henri's only son with her, and when Henri died in October, 1894, his heir and next of kin were absent since the divorce decree having been rendered in August, 1894, Alphonsine was no longer heir or next of kin of her husband (See Hawaiian Statute in Appendix).

The words in the treaty are "heir and representative." These words undoubtedly refer to those persons entitled to succeed to the realty and personalty. The word "representative" does not always mean executor or administrator, but also means next of kin, Sulz *v.* Mutual R. L. F. Assoc. (145 N. Y., 573), and as the word "heir" is used in relation to realty, the word "representative" in this connection undoubtedly means next of kin. As

a matter of fact, the sole next of kin, namely, Henri's son, at the time of his death, was absent in California. Whether this has any direct bearing or not upon the questions now before the Court, this fact exists in the case.

The youthful McGrew was residing in San Francisco with his mother, where she was then under the purview of the Treaty at least a subject or citizen of the United States, and the youthful McGrew was also a subject or citizen of the United States.

Henri McGrew was a citizen or subject of Hawaii, and died in Hawaii leaving goods there. His heir and next of kin, the youthful McGrew, was a subject or citizen of the United States within the Treaty, and had a right under the Treaty to succeed to the goods in Hawaii.

The statutes of Hawaii are in evidence that the child would get the benefit of the policy if there were no debts, and Henri cannot be presumed to have had debts. The fact in the record that the Company *paid* the administrator, and that legally the child was entitled to the benefit is a sufficient justification of the extracts we have given in the appendix from the records of the estate of Henri (See Appendix).

Exception No. 1 was " the Court erred in sustaining the objection of the plaintiff to the introduction in evidence of the payment by the said Insurance Company to J. O. Carter, as the administrator of the estate of said Henri Golden McGrew, deceased, of the full amount of money due upon said policy " (Record p. 36).

It was the view of those who negotiated this Treaty, that the ordinary rule that the administration and distribution of an intestate's estate are governed by the laws of the domicile of the deceased should be changed, and the object of the Treaty was to change this rule and provide generally not only that all questions relating to the administration or distribution of goods, should be governed by the laws of the place where goods were, but *that all*

controversies affecting citizens or subjects of the different states should be. These goods might or might not be at the domicile of the deceased.

In our case, McGrew was an Hawaiian subject or citizen and he died in Hawaii, leaving his heir and next of kin absent in the United States, and with a claim against an American citizen based on goods situated in Hawaii. Assuming Mrs. McGrew could change her domicile and become a citizen of the United States, the Mutual Life was making a claim on her behalf, and it was also making the claim as an American citizen, that it had nothing in its possession constituting assets of the deceased. Here was a question raised by the administrator as to whether the proceeds constituted a part of the deceased's estate, and the suit was against a subject or citizen of the United States, and then the question is, whether the Hawaiian court, having in that suit decided that by the laws of Hawaii the policy was a part of the estate of Henri McGrew, all the courts of the United States would not be bound by it. The administrator had a right to sue the foreign debtor; he did sue it; the goods were there; the decision was that the estate was entitled to it, and the California Court is bound by the law as laid down by the judges in Hawaii, that is, the California courts are bound under the Treaty to apply the law as laid down. The question decided in the administrator's case in Hawaii was a question connected with the estate of an Hawaiian, and as the funds were in Hawaii, the case is brought within the Treaty.

The opinions of the Hawaiian Court annexed hereto show that the Company presented fully its claim that the policy did not belong to the claimant administrator.

The Company was sued, it could not prevent itself being sued. But it stood in the California Courts having the Treaty rights secured to it, namely, that the decision of the Hawaiian Court should be final.

The question was whether the administrator owned the

policy, and the Company, as a citizen or subject of the United States, was bound by the terms of the Treaty and entitled to the benefits of it.

It was not necessary for Mrs. McGrew to be a party to the administrator's suit, for the Treaty declares that the claims in the Carter admr. case should be decided by the laws and judges of Hawaii, and they were so decided, and under the Treaty the Company cannot be vexed twice.

For the purpose of the operation of the Treaty, it was entirely immaterial whether Alphonsine was a party to the Carter suit or not. This is really conceded by counsel for Alphonsine in their brief in this Court on the motion to dismiss the writ of error, where they claim on page 14, as follows:

"If there has been any determination of the ownership of this policy between several claimants, then, by the California judgment, the ownership of this policy has been 'finally decided by the laws and judges of the land wherein the said goods are.'"

The defendant in error claims that no question has arisen in Hawaii among several claimants as to which of them said goods belonged.

But this is practically conceded by the defendant in error, because on the motion to dismiss they claim that if there has been any determination of a controversy as to the ownership of this policy between several claimants, then it has been done by the California judgment in a suit to which Carter Administrator was not a party. The California case was between Alphonsine McGrew and The Mutual Life. If the moving party concedes therefore that a question between claimants arose in the California case, they must necessarily concede that it arose in the Hawaiian suit brought by the Administrator of McGrew against the Company.

Alphonsine was decided by the Hawaiian Court not to be necessary party to the administrator's action.

The defendant in error relies on the California judgment as one in accordance with the treaty. To that action only Alphonsine and The Company were parties. This necessarily involves a concession of the point we have claimed, viz.: that for the operation of the treaty it was not necessary that Alphonsine should be a party to the Carter suit.

This case in California is brought against a citizen of the United States who was a party to the Carter case. Alphonsine comes as a suitor into the Courts of California, which are bound by the treaty. She might be able to attack the Carter judgment for fraud or collusion. But the California Court as a Court was bound by the law as laid down in the final decisions of the Court and Judges of Hawaii. They erred in not so deciding.

The pith of the whole matter is, that a question arose between an Hawaiian and this Company, an American subject or citizen, as to whether this policy was assets of the deceased, or not, and the treaty declared that in such case the law of Hawaii and the forum of Hawaii should control. The Hawaiian Court held Mrs. McGrew not a necessary party, and decided against us that the policy belonged to the estate. Had Mrs. McGrew sued us in Hawaii after this she could not have recovered. The Company is then entitled to protection by the treaty.

She was not a party to the record in the Carter case, but she was personally served in the divorce case and that case involved the title to the policy. She must be presumed to have had knowledge of the Hawaiian law, and that if defeated the divorce case would result in the policy going to her husband. She knew the policy was in Hawaii. Before she removed to California she knew the title to it was a subject of dispute.

On the trial she was asked, "Did you bring this policy

of insurance with you when you came up from Honolulu?"
"A. I did not have it; Mr. Carter had it. He took it out of my husband's safe, while we were in Honolulu. I objected and told him he had no right to take anything that was in the house; *that they belonged to my husband.* He said, at the time, that he was the doctor's guardian" (Record, p. 30).

It is to be observed that Mrs. McGrew here recognized the possession of the policy as rightfully in her husband, and only objected to the guardian taking it on that ground. At the time the divorce suit was pending she knew that in case it was decided against her, the husband would own the policy. She voluntarily went to California, and abandoned the policy so far as any contest over it in Hawaii was concerned.

She left in April, 1894, and the next premium became due in September, 1894, more than a month before October 22, when McGrew died, and the premium must be presumed to have been paid by Carter for the benefit of McGrew.

In Grant *vs.* Conn. Mutual Life, 29 Wisconsin, 125, 131, there was a suit by an assignee of a life policy. The Company defended on the ground that the administrator was entitled to it. The administrator was a non-resident. The assignee applied to have the administrator made a party. It was denied, and this was assigned as error, but the Court said,

"The facts which the plaintiff must prove in order to
"recover, would constitute a complete defense to an action
"brought by the administrator on the policy. For, if
"the insurance money belonged to the plaintiff, then
"the administrator had nothing to do with it. And
"whether it did in fact belong to her, was the issue
"raised by the pleadings. Besides, we do not very
"well see how the court could bring in the
"administrator, he being a non resident. We do not think

"that he could be brought in under any of the sub-divis-
"ions of Section 10, Chap. 124, R. S. And it seems to us
"that the cases provided for by the law of 1864, where the
"Court is authorized to 'prescribe the manner in which'
"the copy of the order and notice of the suit 'shall be
"served, and also the time within which such person or
"persons so served shall appear and file an answer,' relate
"to cases where the parties are within the jurisdiction of
"the Court. Moreover, it may be added in this connec-
"tion, that the bill of exceptions shows that the company
"notified the administrator of the pendency of this action,
"and gave him permission to use its name in any defense
"he might desire to make. This fact might not have been
"known to the Court when it decided the motion, but it
"shows, nevertheless, that the administrator has had a
"full opportunity to contest the right of the plaintiff to
"the insurance money under the answer of the defendant.
"But upon the merits, as we have before stated, we think
"the application was properly denied. For, if the plaint-
"iff showed, as she must do in order to recover, that the
"policy has been legally assigned to her by Allen A.
"Grant, and that she was entitled to the money due
"thereon, then the administrator had no interest what-
"ever in the controversy. And the Company had taken
"the requisite steps to protect itself against the liability
"to pay the policy twice, and was only interested in pay-
"ing it to the real owner. We, therefore, can see no rea-
"son why the relief asked in its answer, that the adminis-
"trator be made a party, should be granted."

In Robbins *vs.* Chicago, 4 Wallace 657, at 674, the following language is used:

"Persons notified of the pendency of a suit in which
"they are directly interested must exercise reasonable dil-
"igence in protecting their interest, and if, instead of
"doing so, they wilfully shut their eyes to the means of
"knowledge which they know are at hand to enable them
"to act efficiently, they cannot subsequently be allowed to
"turn round and evade the consequences which their own
"conduct and negligence have superinduced."

The obvious purpose of the clause of the treaty under

discussion was to provide a fixed and definite *law* and *forum* for the decision of all disputed successions in which the citizens of the several countries were interested.

It would be a narrow construction, indeed, that would confine it only to cases of *actual litigation between the claimants themselves*. Such a construction would in many cases cause infinitely more embarrassment than would the operation of the general rules of private international law.

Take, for example, a legacy of personalty in Hawaii left by a deceased citizen of the United States. Suppose that the will is void by the law of his domicil, but valid by the law of Hawaii. Or suppose that under the law of the testator's domicil one person answers the description in the will, and another by the law of Hawaii. Or suppose a citizen of the United States dies intestate as to personalty in Hawaii, and that by the law of the intestate's domicil the person to succeed as next-of-kin is not the person named by the law of Hawaii.

In all such cases, the question of disputed succession would be apt to arise in the first instance in an action by one of the parties *against the executor or administrator* of the decedent, not against the other claimant, or if the will is void under one law and valid under the other, the question might even arise between the executor and administrator of the decedent, the real beneficiaries not being parties at all.

In all these cases, should the treaty be held inapplicable to such litigation, the law of the decedent's domicil would control under the general rules of private international law, and the various actions above mentioned would be determined in accordance with that law.

Now observe what confusion would follow. The claimant, who was defeated in this litigation, would at once seek to recover the goods from the one to whom the Court (enforcing the law of the decedent's domicil) had given them,

and *then for the first time*, under this narrow and illiberal construction of the treaty, its provisions would become applicable. Under these provisions, the same Court that yesterday decided that the goods belonged to claimant A (enforcing the law of the decedent's domicil) would to-day be compelled to decide that they belonged to claimant B (enforcing the law of Hawaii where the goods are, as required by the treaty). A construction leading to such inconvenient and absurd results could not have been intended, when the whole purpose of the treaty is to simplify and expedite the settlement of disputed successions.

It is clear, therefore, that the clause of the treaty to the effect that "if a question should arise among several claimants as to which of them the said goods belong" does not require for its operation that there should be *actual litigation between the several claimants* touching the title to the goods.

It is submitted that the true meaning is, if in *any* litigation it becomes necessary to pass upon the title to a decedent's goods situated in Hawaii, claimed by a citizen of the United States, that title must be determined by the laws and judges of the land where the goods are, that is, by the laws and judges of Hawaii.

Hence, when McGrew's Administrator, "caring" for the decedent's estate in Hawaii for the benefit of the infant heir absent from Hawaii and a citizen of the United States, sued the insurance company upon the policy in Hawaii, and when the company raised the question of the title to the policy, claiming to retain it for Mrs. McGrew (also a citizen of the United States), the treaty at once sprang into full operation, and the laws and judges of Hawaii could alone determine the question.

But for the sake of argument, protesting however against such a restricted and inconvenient interpretation of the treaty, let us suppose that the clause under discussion does call for litigation *between the claimants* of the

goods. We would reply that such litigation has taken place in the Hawaiian courts, whose decision under the treaty must be regarded as "final."

Such litigation took place in the divorce suit between McGrew and his wife, which necessarily involved the title to the goods, *i. e.*, to the policy.

It again took place in the administrator's action against the Insurance Company which was prosecuted by the administrator as trustee for the infant son and which the company defended as *trustee for Mrs. McGrew* by urging her title. She was thereby substantially made a party to the litigation.

Even if Mrs. McGrew could not be regarded as substantially a party to this action, it is a sufficient compliance with this assumed requirement of the treaty that the company itself, as trustee for Mrs. McGrew, was a claimant.

II.

THE INSTANT THE CONSTITUTION OF THE UNITED STATES WENT INTO EFFECT, THE SUPREME COURT OF CALIFORNIA WAS BOUND BY IT TO GIVE FULL FAITH AND CREDIT TO THE DIVORCE DECREE AND PUBLIC ACTS OF HAWAII AND THE JUDGMENT IN THE ADMINISTRATOR'S ACTION, AS WELL AS BY THE TREATY.

"It seems clear from the authorities cited that the "Hawaiian Islands were a part of the territory of the "United States on the 16th day of August, 1898, as much "so as the State of Indiana or the Territory of New "Mexico" *Ex Parte* Edwards, 13 Hawaiian Rep., 32, 38).

"A further ground for believing that Congress did "not intend to fully extend the Constitution here or "fully incorporate these Islands as an integral part of the "United States is the construction put upon that Resolu-

" tion by Congress itself, as shown by the Organic Act of " April 30th, 1900. It was then and not until then that " Congress felt itself in a position to determine the status of " Hawaii " (*Ex Parte* Ah Oi, 13 Hawaiian Rep., 556).

(1.) *The Constitution of the United States protected the Company on account of the divorce decree.*

The divorce action to which Alphonsine McGrew was a party by personal service was commenced February 9, 1894, in Honolulu, and at that time Henri McGrew and his guardian Charles L. Carter, and the defendant Alphonsine were all domiciled in Honolulu (Rec., p. 15).

The policy itself was in Honolulu.

The question in that case was the right to a divorce by Henri McGrew, and flowing out of and incidental to that question, the further question of the ownership of the policy. The divorce action started the question whether Alphonsine McGrew had committed adultery and if so then Henri McGrew should hold such personal estate forever. The Hawaiian Court thus obtained jurisdiction of the policy, and this prevented it, or her contingent interest in it, from following the domicil of Alphonsine, if otherwise, it could have done so, and she could change her domicile, which we deny.

Civil Code Hawaii, Section 1331.

The defendant in error concedes in her brief here on the motion to dismiss the writ of error that the divorce case was one in which a question arose between the claimants, Henri McGrew and Alphonsine McGrew as to which of them the policy belonged. For on page 15 of such brief, she says:

" If the defendant in error was domiciled in California at the time of the decree of divorce, the Hawaiian Law forfeiting her title to this policy of insurance could not, under the treaty, take effect, because it was not the law of

the land wherein the said policy was. The law of the land wherein the said policy was situate, was the law of California, where the owner of the policy was domiciled."

The divorce decree finally determined that the policy belonged to Henri McGrew, and under the Constitution of the United States the Company was protected, and the Supreme Court of California erred in not reversing the judgment, because pending the appeal the Constitution of the United States, and the statute of 1904, passed in pursuance thereof, became operative upon the Hawaiian divorce judgment, and the Supreme Court of California was bound to give such judgment the same faith and credit as are given in Hawaii.

The effect of the divorce decree was to pass the title to the policy and that is the faith and credit given to the divorce decree in Hawaii. In the administrator's case (10 Hawaii, 117, 122, see Appendix, p. 1), the Court said:

"By this statute the interest of Alphonsine McGrew "under this policy passed *upon the divorce* to her hus- "band, and the insurance is now payable to the adminis- "trator of his estate. The policy and her interest under "it were personal estate, and, the contract having been "entered into in these islands, the divorce having been "granted here, and the parties having been domiciled "here, the beneficiary must be determined by the laws of "these islands."

And on the rehearing the Court said (see Appendix, p. ,):

"But however that may be, both parties were undoubt- "edly domiciled here when the divorce proceedings were "commenced, and when the Court acquired jurisdiction "over them, and that was sufficient so far as the question "of domicile was concerned. The Court having acquired "jurisdiction under these circumstances, the incidents of "the divorce would follow according to the law of the "place of the divorce."

No further judicial proceedings in Hawaii were necessary to vest the title in Henri. The divorce decree was sufficient. That was the faith and credit it had in Hawaii, and it must have been the same here.

So in a suit by Alphonsine against this Company in Hawaii the decree of divorce would have been a sufficient answer.

The Constitution of the United States required full faith and credit to be given to the decree in the divorce action in Hawaii.

In Laing *vs.* Rigley, 160 U. S., 544, it was held that under the constitution of the United States a New Jersey decree covering costs, counsel fees and alimony, was entitled to full faith and credit in New York.

In Lynde *vs.* Lynde, 181 U. S., 186: "The husband "* * * having appeared generally in answer to the "petition for alimony in the Court of Chancery in New "Jersey the decree of that Court for alimony was "binding upon him."

Bullock *vs.* Bullock, 57 New Jersey Law Reports, 508.

In the above case a decree for alimony was made by the Supreme Court of New York, where the Court had jurisdiction over the parties, and where the defendant was duly served with a process, and appeared and answered the bill of complaint in that Court, it was held that an action on such a decree will lie in New Jersey.

So the Court erred in not holding that the policy had been decreed to belong to Henri McGrew.

The Constitution requires full faith and credit to be given to the Hawaiian divorce statute.

The statute in question is not a penal statute in an international sense within the meaning of

Huntington *vs.* Attrill, 146 U. S., 657.

In the last case Mr. Justice Gray states that the question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the Courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

There has never been any change by this Court from the doctrine laid down in Huntington *vs.* Attrill.

One test of a strictly penal action is given in the Boston M. R. R. *vs.* Hurd, 108 Federal, p. 116, 119. The Massachusetts statute was involved punishing railway corporations by fine of from $500 to $5,000 for negligence causing death, to be recovered by indictment. The Court said:

"The most important one we have to deal with is whether the Massachusetts statute is strictly penal. It is not sufficient that it is in the nature of a penal statute. The distinction between a statute strictly penal, or *qui tam*, and one in the nature of a penal statute, is pointed out in Huntington *vs.* Attrill, 146 U. S., 657, 13 Sup. Ct., 224, 36 L. Ed., 1123. The proper test is that, if it is strictly penal, the remedy is subject to the control of the Executive of the State by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon. That its essential nature in this respect is not changed by a judgment was determined in Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265, 8 Sup. Ct., 32, 1370 L. Ed., 239."

In the case of the Hawaiian statute there is no question of course of the possibility of a pardon by the Executive, and in regard to the nature of the divorce case in Hawaii resulting in the title to the policy being transferred, such a result could not be obtained in any way by an action by the People or the State, or a *qui tam* action by an in-

former. That is, the matter is purely civil, or property matter arising out of the marital status.

The answer which counsel for Alphonsine made in the Court below was (before the Constitution went into effect) that the above Federal case of Huntington *v.* Attrill was binding on the California Court only when the question at issue was one which might be re-examined by the Supreme Court of the United States, on writ of error, and that the rule laid down in the Attrill case was not the rule in any State of the Union. Our proposition is therefore conceded.

The California Court did not pass on the point, for, in their opinion, they say:

"Under our view of the case it is not necessary to de-
"termine the points made by respondent, that the
"Hawaiian statute has no force here on the ground of
"comity, because it is penal, works a forfeiture, and
"is contrary to the public policy of this State, etc."

The constitutional provision includes the acts, records and judicial proceedings of TERRITORIES *of the United States.* The language of the Constitution of the United States is as follows:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof" (Art. IV, Sec. 1).

By the Judiciary Act of 1790 (26th May, 1790, Chap. 11), Vol. 1, United States Statutes at Large, p. 122), Congress gave effect to this provision of the Constitution.

By the Act of March 27, 1804, (Chap. 56, Sec. 2, Vol. 2, United States Statutes at Large, at page 299), Congress amended the Act of 1790, extending the provisions of that act to the Territories as well as States. Section 1 of this

Act of 1804 provides the manner of authenticating judgments, etc. Section 2 is as follows:

"All provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, Courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, Courts and offices of the several States."

These Acts of 1790 and 1804 appear now in the Revised Statutes of the United States in Section 905 as follows:

"SEC. 905. The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the Courts of any State or Territory, or of any such country, shall be proved or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

(2.) *The Supreme Court of California was bound always by the Treaty and after 1898 by the Constitution of the United States.*

Sec. 10 of the Act of April 30th, 1900, provides that all rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of that act shall continue to be as effectual as if that act had not been passed.

31 U. S. Statutes at Large, 143.

This prevents the Treaty from being ineffectual as to all proceedings, etc., prior to 1900. The Supreme Court of California, therefore, should have applied the Treaty, and further the provisions of the Constitution.

The Supreme Court of California was bound to take notice of the change in the operation of the supreme law of the land effected by the annexation of Hawaii and the extension of the Constitution thereto. When judgment was rendered by the trial court in California, the law of California was supreme, subject only to the Treaty. But before the opinion of the Supreme Court was delivered the California law had ceased to be the controlling law, and the supreme law of the land had become applicable.

Had there merely been a change in the law of California, the court perhaps would not have been bound to apply the changed law, but the express mandate of the national constitution is that the constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, and that the *judges* (appellate as well as trial judges) in each State shall be bound thereby.

Pugh *v.* McCormick, 14 Wallace, 361;
Fairfax *v.* Hunter, 7 Cranch., 603, 627;
U. S. *v.* Peggy, 1 Cranch., 103.

An analogous situation arose in regard to the constitutional amendment abolishing slavery.

In Whitehead *v.* Watson, 19 La. Ann., 68, the Court said:

"At the date of its rendition by the lower court, the "judgment appealed from was, in our opinion, in accord- "ance with positive law then in force; but now so much "of it as awards the slaves described therein and their pos- "session to the plaintiffs is absolutely null. * * *

"We think that under the Constitution and laws of the "United States and Louisiana this Court can render no "decree recognizing property in man."

In Stutsman Co. *v.* Wallace, 142 U. S., 293, this Court held as follows:

"This Court follows the construction by the highest "Court of a State, of its Constitution and laws, unless they "conflict with some provision of the Federal Constitution "or of a Federal statute or a rule of commercial law, and "this is so where the appeal is from the Supreme Court of "a territory if its decision is opposite to the subsequent "decision of the highest Court of the State which is created "from that territory."

In Price *v.* Nesbitt, 29 Md., 264, the Court held:

"That under Article IV, Section 9, the Constitution of "1864, and the Act of 1865, ch. 187, then in force, the "judgment of the Court was right and proper; but that "under Article IV, Section 8, of the Constitution of 1867, "and the Act of 1868, ch. 180, since enacted, and which "have largely extended the right of removal, the judg- "ment must be reversed and the party allowed to remove "the cause."

In Turner *v.* Bryan, 83 Md., 374, the Court states as follows:

"The ruling of the Court below was under the law as "it then stood, whereas the present appeal must be de- "cided by the existing law (Strauss *v.* Heiss, 48 Md., 293). "'It is a settled doctrine,' says this Court in Wade *et al. v.* "St. Mary's Industrial School, 43 Md., 181, 'that courts, "in deciding questions arising before them will look to "the law as it is at the time, and are not to be governed "by what it may have been, unless proceedings under a "prior existing law had been complete or rights had be- "come vested. This principle has been held to apply as "well to cases before an Appellate Court as to those that "are pending in courts of original jurisdiction (United "States *v.* Schr. *Peggy*, 1 Cranch., 103; Price *et al. v.* "Nesbitt, 29 Md., 264; Atwell *v.* Grant, 31 Md., 104; "State *v.* Norwood, 12 Md., 206; Keller *v.* State, 12 Md., "326).'

"But even if it be conceded there was error in the

" rulings of the Court below, inasmuch as the law in ex-
" istence at the time has been abrogated and repealed, the
" appellant has not been injured thereby. It therefore
" becomes unnecessary for us to pass upon the questions
" presented by this appeal, and it will be dismissed, the
" costs to be paid by Anne Arundel County."

In Ferry *v.* Campbell, 110 Iowa, 290 and 81 N.W. Rep., 605, the Iowa Supreme Court held that

" A judgment restraining the collection of an inherit-
" ance tax imposed by acts 26th General Assembly, c. 28,
" on the ground that such act was unconstitutional, is not
" a contract within the constitutional provision prohibit-
" ing the passage of any law impairing the obligation of
" contracts ; and hence such judgment might be properly
" reversed on appeal, where, pending such appeal, the
" legislature passed a retroactive law curing the defects in
" the prior act.

" Where, pending appeal from an order overruling a
" demurrer to a complaint, based on the contention that
" the statute on which the cause of action was based was
" unconstitutional, the legislature removed the defect by
" the passage of an amendment, the fact that the case was
" heard on demurrer, and presented to the Supreme
" Court on an assignment of errors, did not prevent the
" Appellate Court from deciding the appeal under the law
" as amended."

There cannot be any claim in this case that there was any vested right in the decision of the trial court of California. The point was simply that during the pendency of this case in the courts of California, the judgments in Hawaii were given full faith and credit under the constitution of the United States to which they had not been previously entitled. Under this constitutional provision there is no interference with the vested rights.

The fact that the Hawaiian judgment was rendered before annexation is immaterial. Upon the adoption of the Federal Constitution in 1789 and the passage of the Act of 1790, a State Court was bound to give full faith and credit

to the judgments of the courts of other States rendered prior to 1789. In other words, the rule of compulsory comity as to judgments of other States introduced by the Constitution was so applicable. The Constitution requires that full faith and credit shall be given to public acts, records and judicial proceedings of sister States. This is directed to future action of the judiciary. It is not a retro active provision and the case we cite below demonstrates this. Upon this identical principle the California Supreme Court was bound to give full faith and credit to a Hawaiian judgment rendered prior to annexation, for the annexation of Hawaii involved the application of the Constitution to it, and the legal effect upon prior Hawaiian judgments was the same as the effect of the adoption of the Federal Constitution in 1789 upon judgments of State courts rendered prior to said date.

This question is important in view of recent past and possible future annexations. But the question has been already decided.

Thus in the April Term, 1794, was decided the case of Armstrong *vs.* Carson's Executors, 2 Dallas, 302.

In this case a judgment having been obtained in the Supreme Court of the State of New Jersey, an action of debt was brought upon it in Pennsylvania, and the defendants pleaded *nil debent*. The contention was that the only question left open by the Constitution and Act of Congress was whether the Courts of New Jersey would sustain any other plea than *nul tiel* record, if the action in Pennsylvania had been brought in New Jersey. The Court, per WILSON, Justice, said :

"There can be no difficulty in this case. If the "plea would be bad in the Courts of New Jersey, it is "bad here; for, whatever doubts there might be on the "words of the Constitution, the Act of Congress effectu- "ally removes them; declaring in direct terms, that the "record shall have the same effect in this Court, as in the

" Court from which it was taken. In the Courts of New " Jersey no such plea would be sustained; and, there- " fore, it is inadmissible in any Court sitting in Pennsyl- " vania."

It may be stated here that Mr. Justice Wilson, who wrote the opinion in the above case, was one of the active framers of the Constitution.

The above case can be found in the docket of the Middle Circuit Court of the United States at Philadelphia, No. 16, April Sessions, 1792.

The following extract from the Narr discloses that the judgment was rendered in Trenton at the September Term, 1788, some six months before the Constitution of the United States took effect, viz., March 1st, 1789:

MIDDLE CIRCUIT COURT OF THE UNITED STATES OF AMERICA.

APRIL SESSIONS, 1792.

JOHN ARMSTRONG *vs.* JAMES READ, ROBERT MCCLAY and CHRISTIAN FEBIGER, Executors of Joseph Carson, deceased.	No. 16.

EXTRACT FROM NARR.

Filed February 18, 1793.

" That whereas the said John Armstrong heretofore, to " wit, in the term of September, in the year of our Lord " one thousand seven hundred and eighty-eight, in a cer-

"tain Court of Record called the Supreme Court of Ju-
"dicature of the State of New Jersey, before the Honor-
"able David Briarly, Esq., Chief Justice, and his associ-
"ate Justices of the said Court, to wit, at Philadelphia,
"in the said Pennsylvania District, by the consideration
"and judgment of the said Court, recovered against the
"said Joseph Carson in his lifetime a certain debt of
"seven hundred and fifty-one pounds eight shillings and
"eleven pences, lawful money of New Jersey, and also
"fifty pounds three shillings like money for his costs and
"charges by him about his suit in that behalf expended,
"to the said John Armstrong by the said Court of his as-
"sent adjudged, whereof the said Joseph Carson was con-
"victed, as by the record and proceedings thereof remain-
"ing in the said Court at Trenton aforesaid more fully
"appears, which said judgment still remains in that
"Court in full force, unreversed, unpaid and unsatisfied."

The above Armstrong case has been repeatedly cited with approbation (see Fed. Cases Nos. 959, 7169, 13785, 2179; 159 U. S., 182; 111 Fed., 572, and numerous like cases). That is, its treatment of pre-existing judgments has never been criticised, even though the precise point has not been again involved.

This Court, in order to prevent the injustice of compelling a second payment of an obligation which has already been paid under the protection of a judgment of the Supreme Court of a country, which is now a territory of the United States, should adjudge that the California Supreme Court erred in not giving to such judgment the faith and credit to which it was entitled.

No decision of any Federal Court has been found holding that a State Appellate Court is not bound to respect the supreme law of the land and apply it where such law becomes applicable pending an appeal.

(3.) *Alphonsine could not defeat the jurisdiction over the policy by travelling over to California.*

Alphonsine with her contingent interest could not by

change of domicile remove the "goods" from the jurisdiction of Hawaii.

Mrs. McGrew was a party to the divorce action. She could not change her domicile *pendente lite* so as to deprive the Court of jurisdiction over the personal property involved in that suit. There has been no case that we know of on this precise question referring to the effect of a decree of divorce upon personal property, *where a defendant has attempted to change her residence.*

The case of Barrett *v.* Failing, 3 Federal, p. 477, affirmed in 111 U. S., 523, 525, is not directly in point on this feature, because there the divorce was in California and the question arose in regard to the operation of the statutes of Oregon. In that case, however, referring to the specific clause in the Constitution, the Court says, *obiter dictum*

"the law of California, unlike that of this State, does "not provide that a decree of divorce shall work a trans- "fer or forfeiture of one third of the real property of the "one party to the other, and if it did could have no extra- "territorial effect, but would be confined in its operation "to the property of the parties within that State."

Of course this is upon the theory that in all matters affecting *land* the *lex rei sitæ* governs.

The statute of California could not determine title to lands in Oregon. As Mr. Justice Gray said in the opinion of the Supreme Court of the United States, the order "does not of itself transfer any title in real estate unless allowed that effect by the law of the place in which the *real estate* is situated." We are not dealing, however, with any *real estate* situated in California in this case, but with personal property actually situated in Hawaii.

The Supreme Court of Hawaii having decided that the decree had this effect against the extraordinary claim that the wife after *personal service* could defeat the jurisdic-

tion of the Court over the personalty by herself leaving the jurisdiction, the Supreme Court of California was bound by that (Appendix, p. 17).

No case can be found holding that a defendant wife personally served can *pendente lite* acquire a separate domicile for the purpose of defeating one of the incidents of the divorce case.

Alphonsine claimed nothing more than a mere change of *domicile pendente lite*. If the words "wherein the goods are" refer to the law of actual location, then the law of domicile has no application, and it is wholly immaterial whether her domicile changed or not.

The claim that a defendant wife can after service upon her remove herself from the jurisdiction so as to affect in any way the jurisdiction already acquired is preposterous, and therere is absolutely no shadow of an authority for such a propositio.n

On the possibility of changing her domicil pending the divorce case defendant in error cites Anderson *v.* Watt and Cheever *v.* Wilson. But there is absolutely nothing in these cases to support the proposition that a guilty wife can defeat the jurisdiction acquired over herself and property by fleeing from the forum. Cheever *v.* Wilson is the common case of a *plaintiff wife* acquiring a separate domicil. Alphonsine in California was *defending* the suit, *i. e.*, maintaining the marital relation. The unavoidable length of this brief prevents us from repeating here the arguments on the Hawaiian statute contained in the Record, pages 75-88.

Alphonsine took nothing actually with her that related in any way to this policy. The California Court decided that she took the "goods" with her to California, and in so deciding, the California Court nullified the terms of the treaty. The California Court, notwithstanding the treaty provides that the controversy shall be determined according to the stat-

utes and Courts of the place where the personal property is actually situated, decided that the same should be determined by the laws of the place where Alphonsine had her domicile and that by moving her domicile to California, that of itself gave to the California Court the power of final decision as to this property. which was manifest error.

In order to make the change of domicile material it is necessary to show that that law governs, and it manifestly does not.

The attempted change of domicile could not deprive the Hawaiian Court of jurisdiction over the contingent interest in the policy any more than it could change the grounds for the divorce itself. The matrimonial domicil was Hawaii, and the contingent interest of the husband whether dependent on death or divorce was governed by that law, Alphonsine could not change at her will. "All writers "it should be noticed, appear to admit that a change of "domicil does not affect the rights of husband or wife to "property fully acquired by either of them under the law "of their former divorce" (Dicey, 651). Property rights acquired from her husband during marriage are governed by the law of the matrimonial domicil, of which law the effect of a decree of divorce upon the property rights of the wife is one. How much less can a defendant wife affect her husband's rights and deprive the insurance company and her son of the benefits of the Treaty. As between the son and the mother clearly the son was entitled to the insurance.

Jurisdiction once acquired cannot be ousted by subsequent events.

Koppel *v.* Heinrichs, 1 Barb., 450.
Tindall *v.* Meeker, 1 Scamm., 137.
Hard *v.* Shipman, 6 Barb., 631.

"No change in the condition or residence of the par;

"ties can take away a jurisdiction which has once at-
"tached."

Upton *v.* N. J. So. R. R., 25 N. J. Cy., 375.

Alphonsine abducted the child from the jurisdiction, but she could not thereby deprive the Court of its jurisdiction to award the custody. She might, indeed, deprive the Court of the power of enforcing its decree, but could not affect its jurisdiction. In the case of the policy she neither deprived the Court of jurisdiction or of its power over the policy. The California Court has attempted by what Mr. Justice Brewer calls "fine spun theories about situs" (166 U. S., 225), to defeat for a time the treaty and the Constitution.

The actual physical location of the goods was not changed.

It is undisputed that at the time when the divorce suit was commenced and Alphonsine appeared therein, these "goods" or personal property, namely, the insurance policy, were located in Hawaii. The removal of Alphonsine from Hawaii to California did not change the location of this property.

The contention that Alphonsine became domiciled in California, and thereby defeated the jurisdiction of the Hawaiian Courts as to the policy involves the defendant in error in the difficulty that in such case from April 5, 1894, the question as to whom the goods belong arose under the treaty between Henri, a subject or citizen of Hawaii, and Alphonsine, a subject or citizen of the United States within the purview of the Treaty.

While the divorce suit was pending and on April 5, 1894, Alphonsine McGrew moved to California, and then changed her domicile, as claimed by her counsel here.

From that time on, then, *adopting defendant in error's*

contention, the divorce case and the question as to ownership of the policy were between a subject or citizen of Hawaii, and a subject of the United States, and the goods were in Hawaii.

When Alphonsine McGrew left Honolulu she could not by such leaving interfere with the binding action of the Hawaiian Courts, and the California Court so holds when it says "their construction of the statutes of their own country cannot be here assailed (McGrew *vs.* McGrew, 9 Hawaiian Reports, 475). Full effect must therefore be given to the judgment in the divorce suit," and again they say, "we are compelled to hold that the said judgment was final and conclusive as to the matter therein adjudicated" (Rec., fol. 193).

But if, as counsel claims, she became domiciled in California as a subject or citizen of the United States, then in addition to the binding effect of the Hawaiian decision *arose the operation of the treaty*, and the controversy going on in Honolulu involving the ownership of the policy, became one between a subject or citizen of Hawaii and a subject or citizen of the United States.

Construing the treaty by the rules of liberal construction already advanced, the words "subjects or citizens" must not be construed restrictively, or narrowly. Mrs. McGrew abandoned Hawaii permanently, and in August, 1895, the decree of divorce was procured against her. If, as counsel claims, she was after April 5, 1894, domiciled in California, then her *status* as a "subject" is governed by said domicile.

See The *Pizarro*, 2 Wheaton, 227, where it is said (p. 245):

"As to the second objection, it assumes, as its basis, "that the term 'subjects,' as used in the treaty, applies "only to persons who, by birth or naturalization, owe a "permanent allegiance to the Spanish government. It is, "in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty

"are manifestly designed to give reciprocal and co-exten-
"sive privileges to both countries; and to effectuate this
"object, the term 'subjects,' when applied to persons ow-
"ing allegiance to Spain, must be construed in the same
"sense as the term 'citizens,' or 'inhabitants,' when ap-
"plied to persons owing allegiance to the United
"States. What demonstrates the entire propriety of
"this construction is, that in the 18th article of the
"treaty, the terms 'subjects,' 'people' and 'inhab-
"itants,' are indiscriminately used as synonymous to
"designate the same persons in both countries, and in
"cases obviously within the scope of the preceding
"articles. *Indeed, in the language of the law of nations,*
"*which is always to be consulted in the interpretation of*
"*treaties, a person domiciled in a country, and enjoying*
"*the protection of its sovereign, is deemed a subject of*
"*that country.* He owes allegiance to the country, while
"he resides in it: temporary, indeed, if he has not, by
"birth or naturalization, contracted a permanent alle-
"giance; but so fixed that, as to all other nations, he fol-
"lows the character of that country, in war as well as
"in peace. The mischiefs of a different construction would
"be very great; for it might then be contended that ships
"owned by Spanish subjects could be protected by the
"treaty, although they were domiciled in a foreign coun-
"try, with which we were at war; and yet the law of na-
"tions would, in such a predicament, pronounce them
"enemies. We should, therefore, have no hesitation in
"overruling this objection, even if it were proved that Mr.
"Hibberson was not a naturalized subject of Spain; but
"we think the presumption very strong that he had be-
"come, in the strictest sense of the words, a Spanish sub-
"ject."

See also United States *vs.* Chong Sam, 47 Fed., 885 (repeated), where the Court says:

"The argument is founded on the words 'any Chinese
"person, whether a subject of China or any other
"power,' but that phraseology is broadly descriptive of
"the race prohibited from entering, and forbids any ex-
"ception because of the political relation individuals of
"the race may hold to any country. In the language of

"the law of nations, as applied in the interpretation of "treaties, 'a person domiciled in a country, and enjoying "the protection of its sovereign, is deemed a subject of "that country.' The *Pizarro*, 2 Wheat., 246. It is in "this general sense that the word 'subject' is used in the "clauses referred to; not in its strictest meaning."

The *Friendschaft*, 3 Wheat., 114.
The *Venus*, 8 Cranch, 252.

The law will presume all persons domiciled in a country to be a citizen of that country;

State *vs.* Blackmo, 6 Blackf. (Ind.), 489,

and therefore, plaintiff in error having shown the domicile of the parties, cast the burden of proving they were not citizens on the other side.

This principle is shown by the recognition of domicile as the test of that citizenship necessary to confer jurisdiction upon the Federal Courts, since State citizenship follows domicile by operation of law.

Case *v.* Clarke, 5 Mason, 70.
Poppenhauser *v.* India Rubber Co., 14 Fed. Rep., 707.
Burnham *v.* Rangeley, 4 Fed. Cas., 775.

But this is immaterial as the question is not as to technical citizenship.

Assuming then for purposes of this argument that Alphonsine could change her matrimonial domicile, and become a subject or citizen of the United States on April 5, 1894, then the controversy in the divorce action as to the status of the parties, which included the status of this policy, was one between Henri as a subject and citizen of Hawaii, and Alphonsine as a subject and citizen of the United States, and the Treaty became operative and

the decision in the divorce case became binding upon the courts of California.

(4). *The Constitution of the United States protected the Company by reason of the judgment in the administrator's action, and the Supreme Court of California erred in not reversing the judgment because pending the appeal the Constitution of the United States and the statute of 1894 passed in pursuance thereof became operative upon the Hawaiian administrator's judgment and the Supreme Court of California was bound to give such judgment the same faith and credit as are given in Hawaii.*

This Company was under the Constitution protected by the judgment in the administrator's action.

Under the treaty the decision in the administrator's suit was binding on the California Courts, as the claim by the administrator based on the divorce decree had been finally settled by the laws and Judges of Hawaii wherein the policy was, and the money paid. The point is that under the Treaty the California Court was bound by the law as laid down by the Hawaiian Courts.

While this is not the case of a double payment to identically the *same person*, yet the principle stated by the Court in American Central Ins. Co. *v.* Hettler, 37 Neb., 853, is pertinent.

"Gary, P. J., says 'that the construction of the law "given by that Court might subject the plaintiff to the "payment of the debt twice.' With due respect to that "honored Judge, it seems to the writer that such a con- "struction is abhorent to our sense of justice. By what "right do the Courts—the conservators rights—sanction "the double payment of a debt, and indifferently fold "their arms and say in effect that 'it isnone of our bnsi- "ness'? It is the business of the Courts to administer

" justice as far as possible and protect and enforce the " rights of everyone."

Alphonsine could not have attacked the divorce decree and administrator's suit in Hawaii. They were binding on her. The same faith, credit and force should have been given to them in California.

It was not necessary to find that she should hav been a party to the administrator's suit, for she was to the divorce suit. The company fully represented her in the administrator's suit. The case is within the spirit of the following Hawaiian decisions :

In Kaleialii *v.* Grinbaum, 9 Hawaiian Reports, 213, it was held that a judgment—for the defendant—in an action brought by one to whom a promise was alleged to have been made for the benefit of another, will bar a second suit brought by the one for whose benefit the promise was alleged to have been made.

The Court said (p. 216): "It is not necessary that the " parties to the suits should be nominally the same; it is " sufficient if they are really and substanially the same in " interest."

In Jardin *v.* Madeiros, 9 Hawaiian Rep., 503, the Court said :

" After an examination of the pleadings and records in " this case and the first one pleaded in bar, it seems to us " that the question in issue, viz., the ownership of the " said cow, is the same in both cases, both cases being " replevin ; the parties were virtually the same, though " nominally different ; in this case the daughter suing " by her father, in the first case the father, who was the " nominal defendant, defending in right of his daughter, " he being by statute the natural guardian of her person " and property, and entitled to prosecute and defend all " actions in which she or her property may be concerned."

Mrs. McGrew acquiesced in the divorce, for she made no

claim in the probate proceedings. She allowed the estate to be administered in Hawaii without any claim there, that the divorce did not make the policy a part of her husband's assets.

She was not a necessary party to the administrator's suit in Hawaii, and the Court there so held. Suppose she had brought a suit herself in Hawaii. The Court would have been bound by the judgment in the administrator's action, on the principle of *stare decisis*, or the law of the case, even if not by *res adjudicata*. The Insurance Company litigated the question on behalf of Alponsine, and the Court held Alphonsine not a necessary party. It *must* have been protected therefore in Hawaii. If Alphonsine had sued the Company in Hawii, the Carter decree and judgment would have been a good defence. As the Court says in Matter of Opae, 10 Hawaiian, 188, the Judge is prohibited from changing his opinions by the general principles applicable to *res adjudicata*.

It is well settled that where the title to the same property upon the same state of facts is brought up again, the decision must be the same.

Kolb *vs.* Swann, 68 Md., 521.
Matter of Howard, 26 N. Y. Misc., 233.

This is not a simple case of one party suing a debtor in one jurisdiction, and another party suing the same debtor in another jurisdiction on the same debt. The administrator's suit is based on and flows out of the divorce case to which she was a party.

It is elementary, of course, that to entitle full faith and credit to be given, so as to make the judgment a bar, the Court must have jurisdiction of the cause and parties. But it is a different question whether this is the sole faith and credit. That is, we can enquire what would have been the effect in case Mrs. McGrew had sued in Hawaii, and if

the effect would have been to bar her, that effect must be given in California.

Had she sued the Company in Hawaii, the two judgments would have been a bar, because—

(1.) The matter was determined in the divorce case *to which she was a party.*

(2.) The Court had held she was not a necessary party to the administrator's action, and on the principle of *stare decisis*, or the law of the case, if not *res adjudicata*, her action in Hawaii would have been barred by reason of the two prior judgments. As the Court says in Haggerty *v.* Amory, 89 Mass., 462: "As the discharge of the defendant "might have been pleaded in bar to an action upon the "judgment in the State of New York and would there "constitute a good and complete defense to it, he has the "same right to plead it in defense to a *like* suit depending "in our courts, and it will there have the same force, "validity and effect to which it would have been entitled "in New York."

In the above Haggerty case a judgment was recovered in New York State, and afterwards the judgment debtor was discharged in bankruptcy there. The Court held the effect of his discharge as a defense in Massachusetts must be determined by the law of New York, saying (89 Mass., 459):

"And accordingly it is laid down as the settled law of "the land that any plea which would be good to avoid or "to afford a defence against a judgment in the state where "it was rendered, may be effectually pleaded in any other "state, in any action there commenced upon it (1 Kent "Com., 6th ed., 261; Shumway *v.* Stillman, 4 Cow, 292). "It was distinctly and emphatically declared by Marshall, "C. J., in the case of Hampton *v.* McConnel, 3 Wheat., "234, that the judgment of a state court is to have the "same credit, validity and effect in every other court in "the United States which it has in the state where it is

"pronounced, and that whatever pleas would be good in "a suit thereon, in such state, and none others, could be "pleaded in the courts in any other of the United States.

"In this state it has been determined, both in refer- "ence to judgments rendered here and those rendered in "the courts of other states where the law and course of "proceedings were, as it appears to have been assumed, "the same as in our own, that a discharge in insolvency, "procured subsequently to the rendition of a judgment "upon a cause of action which accrued prior to the peti- "tion of the debtor for the benefit of the statute, cannot "be pleaded in bar to an action upon such judgment "(Sampson *v.* Clark, 2 Cush., 173; Woodbury *v.* Perk- "ins, 5 Cush., 86; Faxon *v.* Baxter, 11 Cush., 35). But "these decisions are not applicable to and therefore can- "not control the present case, because the validity, force "and effect of the judgment declared on, and the defence "which may be made to do it, do not at all, as has already "been shown, depend upon the law of this commonwealth, "but upon that of the State of New York, where it was "rendered, and where the law and the course of proceed- "ing are essentially different from our own. If an action "for the recovery of a debt due is pending in our courts "when the debtor becomes a bankrupt and his estate is "duly transferred to assignees, it is, in accordance with "the uniform and settled practice of the courts, ordered, "on motion of the defendant, to be continued, that he may "have opportunity to obtain and plead his discharge. "But this practice has not been established or directly "authorized by the provisions of any statute, or even by "any positive and final decision of the court of last resort; "but has been acquiesced in as a reasonable rule, which "in its operation could hardly fail to afford adequate pro- "tection to the rights of all parties. No such rule appears "to have prevailed in the State of New York.

POINT VII.

Summary of argument that the laws and Judges of Hawaii had the final decision of this controversy, and that the Hawaiian proceedings and statutes were entitled to full faith and credit in California.

The argument in this brief has been directed towards demonstrating that the supreme law of the land which should have governed the California Court was the treaty and the Constitution of the United States. It was first shown that by the "laws and judges of the land wherein the said goods are" was intended the law and forum of the place where the goods were situated, sometimes known as the *lex situs* or *la loi de la situation*, and the forum *rei sitae*, and that this was agreed to be the law and the forum which should govern between the United States and Hawaii and that such law and forum were the deliberate selection by the governments of the two countries out of the various laws, and fora applied in the world's jurisprudence, namely, the *lex domicilii*, the *lex ligeantiae*, or *la loi nationale*, and the various possible fora.

It was then demonstrated that a policy of insurance could have an actual physical *situs*, so that the law of the land where the policy actually was could be applied, and that such was the intention of the treaty.

It was then shown that the policy at the time of the commencement of the divorce case was under every theory in the conflict of laws governed by the law of Hawaii.

Both at the time of the divorce and at the time of the commencement of the suit by the administrator against an American citizen, namely, The Mutual Life, in the course of the administration of the intestate's estate, the

policy was actually situated in Hawaii. In the suit therefore against The Mutual Life by Carter, Administrator, the Hawaiian Court was bound under the treaty to apply the law of the Hawaii, and the Hawaiian Court alone had jurisdiction.

When the company was sued in California, it was entitled to rest upon the protection afforded to it by the treaty on the ground that the California Court was bound by the Hawaiian law, and the California Court had no jurisdiction.

At the time the Supreme Court of California decided this case, the Constitution was in effect in Hawaii, and all the judicial proceedings, public acts and records of Hawaii were entitled to the same faith and credit in the Courts of California as they were entitled to in Hawaii. Had Mrs. McGrew sued this company in Hawaii, she would have had no claim to the policy, and the California Court had no jurisdiction and no power to do anything except give the same faith and credit to the proceedings in Hawaii. The question is what is the significance and effect of these decrees in Hawaii, to be determined by the decisions of the courts of Hawaii (Hancock Bk. *v.* Farnum, 176 U. S., 643).

The point urged by the counsel for the defendant-in-error that "no question has arisen among several claimants as to which of them said goods belong," and that therefore "the contingency that would bring the treaty into operation has never arrived" involves the claim that a "restrictive" and not a "liberal" construction should be placed upon the language of the treaty.

Henri McGrew had lived in Honolulu all his life except for a short time when he was in college (Record, fol. 58), and consequently was a subject or citizen of that country. The divorce decree passing the title to the policy was obtained there in a suit in which Alphonsine appeared per-

sonally. He died there, leaving as his next of kin his only son residing in San Francisco, and Carter was appointed his administrator by the courts of Hawaii. Carter, as such administrator, and in the course of the settlement of the estate, brought suit for the benefit of the absent heir or representative in the courts of Hawaii against this plaintiff-in-error, the Mutual Life Insurance Company of New York, a subject or citizen of the United States, and as such entitled to the benefits and protection conferred by the treaty. Carter, administrator, in that suit *claimed* that by the divorce decree the "goods" belonged to him as part of the estate of said Henri McGrew, and that Alphonsine McGrew had no interest or rights therein. The Insurance Company defended the suit and disputed the "claim" on behalf of Alphonsine, in the fullest and most exhaustive manner. The "question" came before the Hawaiian court to "decide" whether the "goods" belonged to the estate of Henri McGrew or to the defendant in error here, Alphonsine McGrew. The Hawaiian Court followed the divorce decree and "decided" the "claim" in favor of the plaintiff in that action and decided that under the divorce decree the "goods" belonged to the estate of Henri McGrew and not to Alphonsine. Judgment was thereupon entered in favor of Carter, administrator, and the Insurance Company paid the amount of the policy to him as such administrator, and he turned the proceeds over for the benefit of Henri's son.

Unless an exceedingly "restrictive construction" is placed upon this treaty a "question among claimants" did "arise" which was "decided" by the "laws and judges of the land" of Hawaii.

But, that is not all. After such decision, judgment and payment, Alphonsine brought this suit in the California State Court, and in that State Court she "claimed" the "goods" and demanded payment of the policy from

the said Insurance Company. The California State Court should have said to the plaintiff in that suit: "This Court has no authority to decide this 'claim.' The treaty between the United States and Hawaii and the Constitution of the United States takes from this court all power of deciding independently the 'claim' as to these 'goods' which have already been adjudicated. The treaty is the supreme law of the State of California. This court must be bound by the decisions of the Hawaiian Court already rendered as to any claim to these 'goods.'"

Such a decision is the only one the State Court, having respect to the treaty and Constitution could have rendered.

Any "question" between these "claimants" or any other "claimants" that may arise on the one hand, and the Insurance Company, a New York corporation, on the other, can be decided only by the "laws and judges of the land" of Hawaii, and such laws and judges have decided in favor of the estate of Henri McGrew.

It would be putting a very "restrictive construction" upon the treaty and would violate the Constitution of the United States for this Court to say that, because Alphonsine was not a party to the *administrator's* suit in Hawaii, even though a party to the divorce case which determined the title, notwithstanding the Insurance Company, a New York corporation, appeared and raised the "question" as to the "claim," as to whom "the said goods belonged," that therefore no "question arose among several claimants as to which of them said goods belonged."

The Courts of Hawaii in the divorce case decided that the policy belonged to Henri and decided against this New York corporation, that Carter, the administrator of Henri McGrew, "succeeded to" these "personal goods" for the son of Henri McGrew, and decided that said administrator

should "take possession thereof by himself" in accordance with the language of the treaty.

When it is considered that the "restrictive construction" if placed upon this treaty and an ignoring of the Constitution of the United States would result in compelling the Insurance Company to pay to *both* claimants, that is, to pay the amount of the policy *twice*, this Court should not go out of his way to place such a "restrictive construction" on the treaty or to ignore the Constitution of the United States so as to produce such an inequitable result.

The defendant in error raised the question, in her brief, whether the company had such an interest as is protected by the Treaty, and quotes some ejectment cases.

In Henderson *vs.* Tennessee, 10 How., 323, quoted by opposing counsel, the Court says: "To give jurisdiction to this Court the party must claim the right for himself, and not for a third person in whose title he has no interest."

We are not claiming the right for a third person in in whose title we have no interest. The claim of the company is that it was agreed between the United States and Hawaii that all claims respecting this policy and the proceeds thereof should by reason of the citizenship of the parties and the location of the goods in Hawaii be finally decided by the law of Hawaii and the forum of Hawaii; that by the law of Hawaii Henri McGrew was entitled, and that this has been so adjudged by the courts of Hawaii, and that this company, as an American citizen or subject, was bound by such treaty in the controversy in Hawaii, and is entitled to its protection, and that the California court is bound by the Hawaiian law in any controversy in California.

In the above case of Henderson *vs.* Tennessee, which was an action of ejectment, the defendant Henderson set up as a defense an outstanding title in a third person, and, as Chief Justice Taney says, if he had proved that such

third person had a better title than the plaintiff, it would have been a good defense. But the Court holds that while under the well settled law of ejectment a defendant may protect himself by asserting the rights of a stranger, of one not in privity with him or sustaining any legal relation to him, he cannot use the rights of such stranger as the ground upon which to base the jurisdiction of this court. The alleged rights of the stranger arose under a treaty between the United States and the Cherokee Indians, which provided that Cherokees electing to become citizens of the United States should be entitled to 640 acres of land.

In the case at bar the Insurance Company is not claiming *under any other person.* It claims immunity under the treaty in *its own right.* The status of our creditor was established in Hawaii, and our Treaty right is the protection we claim under it. Its legal relations with both Alphonsine McGrew and Henri McGrew were purely those of contract, of obligation. The only transfer of rights involved in this case is that of the contingent interest of Alphonsine McGrew in the policy to Henri McGrew effected by the divorce in Hawaii. Consequently all citations of ejectment cases or other cases involving real estate titles are wholly unapplicable. In none of the cases cited by the defendant-in-error upon this point, were the legal relations, past or present, of the litigating parties contractual. We claim that we are protected under the treaty.

It seems to have been the intention of Congress by the amendment of 1867, to the Judiciary Act, to enable this Court to protect the right and claims under a treaty, etc., from the effect of the errors of a State (Curt. Jur., U. S. Court, 2nd Ed., pp. 59–60), Court as to the erroneous rejection of evidence.

The two laws differ in the following particulars:

In defining the cases over which this appellate power shall extend.

In the earlier law one class of cases was described as

follows: "Or where is drawn in question *the construction* of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States" This was the statute in 5 Cranch 344).

In the later law there is substituted the following fuller description: "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, etc."

The earlier law describes and includes only cases where some *question of construction* is drawn in question. The later law applies to and includes all cases where a privilege, immunity, etc., was claimed under the Constitution, etc., and the decision was against such claim, whether that decision rested upon some question of construction of the Constitution, or some law or treaty of the United States, or upon any other question entering into the decision of the State Court on the title capable of being assigned as erroneously made in contravention of law.

This latter description may include cases other than those embraced in the earlier law. The State Court may have decided against the claim, etc., without misconstruing the Constitution or any Act of Congress, and yet have made a decision erroneous in point of law in the judgment of the Appellate Tribunal.

It seems to have been intended to place titles, rights, privileges or immunities claimed under the Constitution, laws or treaties of the United States under the final guardianship of this Court, on whatever question of law the same might depend.

Will the United States Supreme Court compel this Insurance Company to pay a second time to the wife of the deceased the amount of this policy, when it has already paid the amount thereof for the benefit of the son of the deceased on judgments based on Hawaiian law which the proper rules of International law, the *treaty with the United States and the Constitution of the United States say shall be final?*

POINT VIII.

The judgment should be reversed and remanded to the State Court for a new trial in the light of the Treaty and Constitution as claimed herein.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERIC D. MCKENNEY,
W. H. CHICKERING,
WARREN GREGORY,
Of Counsel.

FILE COPY.

JAN 14 1903

Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX TO BRIEF OF PLAINTIFF IN ERROR.

I. Opinions of the Supreme Court of Hawaii in Carter, Admr., vs. The Mutual Life. Page I.

II. Specimens of Treaties between the U. S. and Foreign Countries Similar to the Hawaiian Treaty. Page XVIII.

III. Copies of Treaty Clause in Litigation here as it Appears in Foreign Languages in other Treaties. Page XXXII.

IV. Hawaiian Statute of Distributions, and Account of Carter, Admr. Page XXXVII.

V. Letter from French Consul on Language of Treaty. Page XL.

APPENDIX.

I.

Opinion of the Supreme Court of Hawaii in Carter administrator is The Mutual Life.

JOSEPH O. CARTER, Administrator of the Estate of HENRI G. McGREW, deceased,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

These opinions are reported in 10 Hawaiiain Reports, 117, 570.

QUESTIONS RESERVED BY CIRCUIT COURT, FIRST CIRCUIT.

Submitted July 12, 1895. Decided August 15, 1895.

JUDD, C. J., FREAR, J., and Mr. CECIL BROWN of the Bar, in place BICKERTON, J., absent from illness.

A policy of insurance was issued to M, payable upon his death to "A, wife of M, if living; if not living, to his executors, administrators or assigns." M afterwards obtained in the Circuit Court a decree of divorce from A for her adultery. A took exceptions to the decree, but did not get them certified to the Supreme Court. M subsequently died.

Held :

(1.) In an action at law by the administrator of M's estate on the policy A need not be made a party.

(2.) The decree of divorce was absolute and is still in effect.

(3.) Exceptions to the decree granting the divorce, so far as property rights were involved, might have been taken to and argued and determined in the Supreme Court, notwithstanding the death of the libellant.

(4.) The insurance, so far as the construction of the policy is concerned, is payable to A, notwithstanding the fact that she was not M's wife at the time of his death ; but,

(5.) By Civ. Code, Sec. 1331, A's interest in the policy passed upon the divorce to M to the administrator of whose estate the insurance is now payable.

Opinion of the Court by Frear, J.,

This is an action on a policy of insurance issued by the defendant company upon the life of Henri McGrew for $5,000 payable upon his death to "Alphonsine McGrew, wife of Henri G. McGrew, * * * * * if living ; if not living, to his executors, administrators or assigns." The company stands ready to pay the money, but desires that it be first judicially determined who is entitled to it—whether Alphonsine McGrew or the administrator of the insured. The doubt upon this point is occasioned by the fact that the insured, prior to his decease, obtained a decree of divorce from his wife on the ground of adultery, the validity and effect of which decree are questioned.

The contract of insurance was entered into in the Hawaiian Islands ; the policy is dated September, 14, 1892, it was issued to Henri G. McGrew, upon his ap-

plication; he retained possession of it and paid all premiums upon it; he died October 22, 1894; at the time of entering into the contract and until his death he was a subject and resident of and domiciled in these islands; J. O. Carter is the duly appointed administrator of his estate; all conditions and requirements necessary to be performed or complied with by the decedent or plaintiff have been performed and complied with.

The case was tried in the Circuit Court, First Circuit, jury waived, upon agreed facts, and comes here with the following questions reserved by the Circuit Court on motion of both parties:

1. Is Alphonsine McGrew a necessary party to this case?

2. Were H. G. McGrew and Alphonsine McGrew divorced; and if so, is the decree of divorce still in effect?

3. Is the amount due on Henry G. McGrew's insurance payable to J. O. Carter, administrator of the estate of H. G. McGrew?

First, this is not a suit in equity, as by bill of interpleader, but an action at law, and therefore, obviously not only is it unnecessary, but it would be improper, to make Alphonsine McGrew a party. This is practically conceded by the defendant.

Secondly, it appears by the agreed statement of facts, including the record in the divorce case, which is made a part of the agreed statement, that on the 24th of August, 1894, an absolute decree of divorce from the bond of matrimony was decreed by the Circuit Court, First Circuit, of the Hawaiian Islands, in favor of Henri G. McGrew against his wife, Alphonsine McGrew, for adultery on her part; that on the 27th of the same

month it was stipulated that it should not be incumbent upon libellee's counsel to present his bill of exceptions until one week after he had been furnished with a transcript of the evidence; that on the 24th of September following he was furnished with such transcript; that on the 1st of October following he filed a paper purporting to be a bill of exceptions; that on the next day libellant's counsel moved the Supreme Court to set the cause for hearing on the alleged bill of exceptions, but that libellee's counsel objected on the ground that the bill had not been signed or allowed by the Circuit Court, and that the motion was denied on that ground; that Henri G. McGrew died on the 22d of the same month; and that no bill of exceptions was ever allowed by the Circuit Court.

The statute (Comp. L., p., 437) provides that in matters of divorce, "Any party aggrieved by any order or decision of the Circuit Court, may except thereto, and his exceptions shall be duly noted, and certified to the Supreme Court, and no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the Supreme Court, sitting in banco, and if the Court in banco shall be of opinion that the order or decision excepted to in said Circuit Court was erroneous, they shall so certify, and thereupon the case shall be heard anew."

It argued in the first place that the decree of divorce never became absolute because the alleged exceptions were never argued and determined in the Supreme Court.

The practice here in divorce as in other law cases has usually been to enter at once in the Circuit Court an absolute decree or judgment, which is subject to be set aside by the Supreme Court on exceptions. This is what is meant by the provisions of the statute that

"no order or decree for a divorce shall be made absolute until such exceptions have been disposed of." An absolute decree is made at once, but, if excepted to, it may be set aside by the Supreme Court. If not excepted to, it is and remains absolute. This has been the construction placed upon the statute in practice and is in harmony with the more general provisions and the practice thereunder, relating to exceptions in all law cases (Laws of 1892, Ch. 57, Secs. 72–78). The "exceptions" referred to in the statute are "exceptions allowed" or "certified to the Supreme Court." If they were merely exceptions alleged to have been made by counsel, whether allowed or certified or not by the Court, and if no absolute decree could be made until such exceptions were argued and determined in the Supreme Court it would be in the power of the party against whom a decree of divorce has been made to forever prevent the decree from becoming absolute by merely filing alleged exceptions, perhaps wholly "unconformable to truth," and never following them up, or attempting to have them allowed or certified, but on the contrary resisting all endeavors on the part of the opposite party to have them disposed of. In this case it appears that no exceptions have ever been allowed or certified to the Supreme Court, and from all the circumstances, it would seem that the libelee had abandoned her intention, if she ever had any, of getting any exceptions allowed if she could, and having them argued and determined in the Supreme Court.

But it is further argued that the divorce case was abated by the death of Henri G. McGrew, and that even if the libelee had desired to take further action on her alleged exceptions she could not have done so. It seems to us that if the libelee had not for other reasons lost her right to take the case to the Supreme Court on exceptions, she might have done so even after the death of

the libellant. Such seems to be the current of authority as to decrees granting divorces in so far as property rights are involved. See Shafer *v.* Shafer, 30 Mich., 163; Downer *v.* Howard, 44 Wis., 82; Wren *v.* Moss, 7 Ill., 72; Danforth *v.* Danforth, 111 Ill., 236; Thomas *v.* Thomas, 57 Md., 504, referred to in 5 Am. & Eng. Enc., 773, Wilson *v.* Wilson, 73 Mich., 620; Barney *v.* Barney, 14 Ia., 189; Kimball *v.* Kimball, 44 N. H., 122.

Thirdly, assuming, then, that the parties were divorced, who is entitled to the insurance? It is argued that since it is payable to "Alphonsine McGrew, wife of Henri McGrew," payment to her is conditioned upon her being his wife at the time of his death, and that since a divorce had taken place she was not then his wife. No such condition can fairly be implied from the words of the policy. The insurance is payable to the person named, "Alphonsine McGrew," and the only condition annexed to the payment to her is that she shall be living at the time of the death of the insured. The words are, "if living." The words "wife of Henri G. McGrew" are words merely of description, not of condition. What provision the insured might have made, had he contemplated the possibility of a divorce is not for us to say or to give effect to. The policy must be construed as it is. That the word "wife" as here used is mere descriptive, and that the insurable interest of the beneficiary need not continue, or that there need not even be an insurable interest in the first place, the insurance having been effected by the insured and not by the beneficiary (see Conn., &c., Co. *vs.* Schaefer, 94 U. S., 457; Vivar *vs.* Knights of Pythias, 52 N. J. Eq., 455; McKee *vs.* The Phœnix, &c., Co., 28 Mo., 383; Overbeck *vs.* Overbeck, 155 Pa. St., 5.

But it is provided by statute (Civil Code, Sect. 1331) that "when a divorce is decreed for the adultery or

other offence amounting thereto, of the wife, the husband shall hold her personal estate forever." By this statute, the interest of Alphonsine McGrew under this policy passed upon the divorce to her husband, and the insurance is now payable to the administrator of his estate. The policy and her interest under it were personal estate, and, the contract having been entered into in these islands, the divorce having been granted here, and the parties having been domiciled here, the beneficiary must be determined by the laws of these islands.

The first question reserved must be answered in the negative, the other two questions in the affirmative, and the case is remanded to the Circuit Court for such further proceedings as may be proper.

CARTER & KINNEY for Plaintiff.
W. R. CASTLE for Defendant.

J. O. CARTER, Administrator of the Estate of H. G. McGrew, deceased

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

MOTION OF REHEARING

Submitted March 11, 1896.
Decided December 19, 1896.

JUDD, C. J., FREAR, J., and CECIL BROWN, Esq., of the Bar, in place of WHITING, J., disqualified.

The question of the effect of a divorce upon the ownership of a policy of life insurance, or the right to the

proceeds thereof, is not a question of the construction of the policy.

The provision in an application for life insurance that it is made "subject to the charter of the Company and the laws of the State of New York," is not an agreement that the question of the effect of a foreign divorce upon the ownership of the policy or the proceeds thereof shall be determined by the statutory law of New York.

By private international law the effect of such divorce should be determined by the law of the place of domicil and divorce.

A rehearing will not be granted for argument by new counsel upon a question raised at the first hearing but which former counsel chose not to argue, at least if it does not appear that a new argument would probably lead to a different result.

A rehearing will not be granted in order to allow argument upon a question of the constitutionality of a statute, even though that question was not argued at the first hearing, where the unconstitutionality of the statute was not made a ground of the motion for a rehearing and it does not appear that an argument upon the question would probably lead to a reversal of the decision.

Where a Court has acquired jurisdiction in divorce proceedings over both parties at the place o their domicil and afterwards decrees a divorce, the effect of the divorce upon the disposition of the personal estate of the wife will not be affected by a change of residence of the wife previous to the signing of the decree.

Opinion of the Court by Frear, J.

The former decision, *ante*, p. 117, in this case was filed August 15, 1895. On October 4, 1895, new counsel for the defendant filed a motion for a rehearing, based

on a number of grounds therein set forth. On March 6, 1896, he filed additional grounds. Opposing counsel objected to the Court's entertaining the motion on the grounds of defendant's laches in filing the same and its acquiescence in the judgment. Affidavits were filed on both sides. The Court thought it best to hear argument upon the motion itself as well as upon the preliminary question of laches and acquiescence, and now, in view of all the circumstances and of our conclusion, we believe it will be more satisfactory to consider the motion entirely upon its merits, without going into the question of laches and acquiescence at all.

The points relied upon by the defendant's counsel in his able and elaborate brief will be considered in their order. We regretted much at the first hearing that we were not thus favored with full argument on behalf of the defendant, except upon one of the many interesting questions involved in the case and at that time argued by plaintiff's counsel or suggested by the Court. The decision was rendered at an early date, as requested on behalf of the defendant, in such a light as the Court then had, and yet in the light of the full argument now presented, we do not find sufficient ground for allowing a rehearing. We come to this conclusion fully realizing both that if a rehearing should be granted, it would by no means imply that the former decision was erroneous, and that the merits of the case are not involved in the disposal of the motion, although, as found by counsel in argument, the merits must necessarily be considered to some extent.

The first point relied on is, that the Court manifestly erred in construing the policy as an Hawaiian contract, whereas, it appears upon its face to be a New York contract. The case was submitted upon an agreed statement of facts in which it was expressly agreed that the "contract of insurance was made and entered

into in the Hawaiian Islands." This is all that was assumed in the decision, namely, in the words, "the contract having been entered into in these islands." But it is argued that the agreed statement cannot be construed as an admission that the policy was an Hawaiian contract. If so, the decision also cannot be construed as holding that, for its language is that of the agreed statement.

It is further argued that, if the agreed statement does contain such admission, then counsel, who signed it, exceeded his authority in so doing and the defendant is not bound thereby. If the statement did contain such admission, the Court would have been perfectly justified in acting upon it. When a case is submitted to the Court upon an agreed statement of facts signed by responsible counsel, it certainly would not be the duty of the Court, it would not be proper to assume that counsel was acting without authority and then decide the case upon the facts directly contrary to those upon which the case was submitted, and especially where as in this case the admission if made, might under certain circumstances be in accordance with the facts notwithstanding the particular language of the policy or other documents before the Court. But it is unnecessary to decide whether the agreed statement did contain such admission, or if it did, whether an attorney at law could as such properly make such an admission, or if not, whether such admission, if made, was in fact authorized or acquiesced in by the defendant itself. For the Court did not as a matter of fact construe the policy as a Hawaiian contract. It construed it precisely as requested by defendant's counsel (holding that the word "wife" in the policy was a word of description, not of condition) in accordance with the judicial decisions elsewhere in similar cases, which so far as appears would be followed in New York as well as in Hawaii.

Not a single New York decision or statute was then cited upon this point by counsel on either side, but it was assumed by the Court and by counsel on both sides that the law upon this question was the same in New York as elsewhere, and the view taken by the Court as to what that law is, is conceded by defendant's present counsel to be correct. It is true the Court spoke of the contract as "entered into in these islands," but even if those words should be construed as holding that the policy was a Hawaiian contract (a construction which defendant's counsel argues cannot be placed upon similar words in the agreed statement) still the words were inserted in the decision merely for what they were worth. They were not then and are not now regarded by the Court as of much importance. The facts of importance, stated in the same sentence, were that the divorce was granted and the parties were domiciled here. Even these facts were not alluded to as having any bearing upon the question of the construction of the policy. The Court had finished its comment upon that question and was then upon the question of ownership. And this seems to be the source of misunderstanding in this case. Construction is confused with ownership. If A had possession of certain personal property under a contract it might be a question of the construction of the contract whether A's interest was, in his own right, and if so, what that interest was, or, if A had died, it might be a question of construction whether the property should then pass to A's representatives or to someone else. These questions would be decided by the law of the place of contract. But suppose the contract was construed as having passed the property absolutely to A and his representatives, the further question who were the representatives would be one, not of construction, but of distribution, to be solved by the law of the place, not of the contract, but

of A's domicil. Or, suppose A had previously assigned the property, his representatives would not take it all—not because of an erroneous construction of the contract by the law of domicil, or any other law, but because the ownership of the property had changed—a question which might necessarily be determined by some other law, as the law of the place of assignment, if that were a different place. So, if A had become bankrupt and the property had become assigned by operation of law to his assignee in bankruptcy. So, if A had married and the property had passed by law to her husband, so, as in this case, if a divorce had been obtained against her, and the property had thereupon passed to her husband by operation of law. To allow an assignee of a contract to recover, is not to vary the terms of the original contract, but to enforce the terms of the contract of assignment.

It is further argued, that, if the mere fact that the policy is a New York contract is not sufficient to require the New York law to govern in determining the question of assignment by operation of law, as distinguished from the question of construction, yet it is expressly provided in the policy that the New York law should govern and it was competent for the parties to so agree. Let us assume that such an agreement, if made, would have been valid. The provision referred to is not in the policy proper, a copy of which was before the Court, but in the application, which, although in terms made a part of the policy, was not before the Court and had not to this day been seen by the Court. This provision is stated in the brief as follows: "This application is made to the Mutual Life Insurance Co. of New York, subject to the Charter of the Company and the laws of the State of New York." An application which the parties themselves did not make a part of the case and which the Court had never had an opportunity of see-

ing, could not be considered. Even if it had been a part of the case, the Court would still have been in the dark as to the provisions of "the Charter of the Company and the laws of the State of New York," no proof of which was made. In the present counsel's brief, to be sure, reference is made to an old New York statute differing slightly from our own former statute upon the subject under consideration, but no such reference was made at the first hearing, and if it had been made, would it have been sufficient proof of what the New York law is at present, and might not the charter have contained some other provisions, for, if the parties may have agreed that the property in the policy should pass in a manner different from that prescribed by Hawaiian law, may they not also have agreed similarly as to New York law? But, aside from all this, we do not see how an agreement that the application is made subject to the charter of the company and the laws of the State of New York, can be construed as an agreement that the ownership of the policy itself after it has issued or the right to the proceeds thereof should be determined by that charter or those laws. Not merely because the application is not the policy, though part of it, for even if the policy itself had been issued expressly subject to the same charter and laws (and it probably was issued thereto whether expressly so stated or not) this could not mean that the New York statutory law should govern every question that might subsequently arise in relation to the policy—its ownership, the court in which or the procedure by which it should be enforced, the persons who would be the insured representatives in case he survived his wife, &c. Indeed, New York law must be assumed to include provate international law, by which the effect of a divorce upon the ownership of personal property is determined by the law of the place of divorce at least if that is also

the place of domicil—the New York statute upon the subject so far as it relates to personal property being presumed to apply only to divorces granted in that State. In considering this question, should be borne in mind that the specific provision in the policy relating to assignment is not involved.

The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern whether the action is brought in Hawaii, California or New York. In our opinion that law is the law of the place of domicil and divorce. We can only assume that the California Court will take the same view.

The next point relied on is that, if Hawaiian law, that is, the law of the place of domicil and divorce, is to govern, that law did not pass the policy in question to the husband. The statute (Civ. Code, Section 1331) provided that "when a divorce is decreed for the adultery * * * of the wife, the husband shall hold her personal estate forever * * *" The argument is that, as the Court has held that the former statute (Civ. Code, Section 1286), upon the rights of husband and wife, which made the husband "the virtual owner" of the "movable property" of his wife, was substantially an enactment of the common law upon the subject, and therefore did not pass the wife's choses in action to the husband until reduced to possession by him, so it must by analogy hold that under the statute now in question the wife's choses in action did not pass to the husband under the description of "personal estate" until reduced to possession, and that as the husband did not in this case reduce the policy in question to

possession during his lifetime the wife was entitled to it. The question whether the policy was "personal estate" within the meaning of the statute was argued by counsel for the plaintiff at the former hearing, and was considered and decided by the Court, though this particular phase of the argument was not gone into. A rehearing should not be granted merely to allow new counsel for the defendant to present argument upon a question raised at the first hearing, but which former counsel for the defendant then chose not to argue, at least where, as we believe to be the case here, a rehearing would probably not result in a different decision. For, even if it could be assumed from the facts agreed upon that the husband had not reduced the policy to possession during his lifetime, still the statute in question could not, like the other statute referred to, be presumed to have been intended to be an enactment of the common law, so as to be subject to the alleged exception relating to choses in action, for the common law upon this subject was totally different; it did not allow the husband to reduce to possession his wife's choses in action after divorce at all; after divorce he is no longer husband; his right to the wife's choses in action then is not a marital right; marital rights no longer exist; the right is one of property under the statute. The words "personal estate" used in the statute naturally include all personal estate, whether in action or possession.

The next point relied on is that the statute in question (Section 1331) was repealed by implication by the Married Woman's Act of 1888. This point was considered by the Court before rendering its decision, and, if we remember rightly, was also suggested to counsel at the hearing, but was not touched upon in the decision because counsel had not cared to argue it. Very probably the Legislature which passed the Act of 1889 eman-

cipating married women from the harsh provisions of the common law would have also repealed the section in question if it had been brought to its notice. But this is only a matter of probability as to what would have been done. It was not, in fact, done. The section is not inconsistent with that Act. It may be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery. We are glad to note that the section has since been repealed by an Act introduced by Senator Brown, who, as substitute Judge, took part in the former decision and now takes part in this.

The point made in the brief that Section 1331 is unconstitutional was not made a ground in the motion for rehearing. We need only add that we fail to see the force of the learned argument upon this point.

The next point is that Section 1331 did not apply to the property in question, because at the time of the divorce neither the wife nor the policy were in this country or within the jurisdiction of the Court—the wife because she had gone to California, the policy because, although it remained here in the possession of the husband, being personal property it followed its owner, the wife, in contemplation of law. We presume that by this is meant, not that personal property follows its owner wherever the latter may happen to go temporarily, but that it is governed by the law of the owner's domicil, or residence *animo manendi*. Now there was no proof whatever that the wife in this case intended to change her domicil, which had previously been here, and which in the absence of proof to the contrary would, at least after so short an absence, be presumed to continued here, to say nothing of the rule that the wife's domicil is that of her husband, except under certain special circumstances. But however that may be, both parties were undoubtedly domiciled here when

the divorce proceedings were commenced, and when the Court acquired jurisdiction over them, and that was sufficient so far as the question of domicil was concerned. The Court having acquired jurisdiction under these circumstances, the incidents of the divorce would follow according to the law of the place of divorce.

Finally, it is argued that the divorce had not become absolute because the exceptions taken in the divorce proceedings had not been disposed of (Comp. L., p. 437). The construction of this statute was argued and decided at the first hearing, and we are practically asked to go over the same ground again. The only criticism made upon the former decision of this question is based upon a misconstruction of that decision.

The motion for a rehearing is denied.

W. A. KINNEY, for plaintiff.

L. A. THURSTON, for defendant.

II.

Specimens of Treaties between the U. S. and Foreign Countries similiar to the Hawaiian Treaty.

BAVARIA, 1845.

ARTICLE II.

Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation and exempt from all duties of detraction.

ARTICLE III.

The citizens or subjects of each of the contracting parties shall have power to dispose of their (real and) personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.

ARTICLE IV.

In case of the absence of the heirs, the same care shall be taken provisionally of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has the right to sell the same, according to Article II, may take measures to receive or dispose of the inheritance.

ARTICLE V.

If any dispute should arise between different claimants to the same inheritance, they shall be decided in the last resort according to the laws, and by the judges of the country where the property is situated.

TWO SICILIES, 1845, ART. VI.

* * * * * *

They shall be entitled to * * * dispose of their personal property of every kind and description, by sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other high contracting party, shall succeed to their personal goods, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a

question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.

They shall not be obliged to pay, under any pretense whatever, any taxes and impositions, other or greater than those which are paid or may hereafter be paid by the subjects or citizens of the most favored nations, in the respective States of the high contracting parties.

SAXONY, 1845.

Article II.

Where, on the death of any person holding real property within the territories of one party, such real property would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, or where such real property has been devised by last will and testament to such citizen or subject, he shall be allowed a term of two years from the death of such person—which term may be reasonably prolonged according to circumstances—to sell the same and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction on the part of the Government of the respective States.

Article III.

The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*, and may take possession thereof, either

by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.

ARTICLE IV.

In case of the absence of the heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken, in a like case, of the property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same, according to Article II, may take measures to receive or dispose of the inheritance.

ARTICLE V.

If any dispute should arise between the different claimants to the same inheritance, they shall be decided according to the laws and by the judges of the country where the property is situated.

NASSAU, 1846.

ARTICLE II.

Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same—which term may be reasonably prolonged according to circumstances—and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction.

ARTICLE III.

The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property, within the States of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.

ARTICLE IV.

In case of the absence of the heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same, according to Article II, may take measures to receive or dispose of the inheritance.

ARTICLE V.

If any dispute should arise between different claimants to the same inheritance, they shall be decided, in the last resort, according to the laws and by the judges of the country where the property is situated

HANOVER, 1846, ART. X.

* * * * * *

The citizens or subjects of each party shall have power to dispose of their personal property within the jurisdiction of the other by sale, donation, testament or otherwise.

Their personal representatives being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*.

They may take possession thereof either by themselves or by others acting for them, at their will, and dispose of the same, paying such duty only as the inhabitants of the country wherein the said personal property is situate shall be subject to pay in like cases.

In case of the absence of the personal representatives, the same care shall be taken of the said property as would be taken of the property of a native in like case, until the lawful owner may take measures for receiving it.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situate.

Where, on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective States.

MECKLENBURG, &c., ART. X (1847).

* * * * * *

The citizens or subjects of each party shall have power to dispose of their personal property within the jurisdiction of the other by sale, donation, testament, or otherwise.

Their personal representatives, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their will, and dispose of the same, paying such duty only as the inhabitants of the country wherein the said personal property is situated shall be subject to pay in like cases. In the case of the absence of the personal representatives, the same care shall be taken of the said property as would be taken of a property of a native in like case, until the lawful owner may take measures for receiving it.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situated.

Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective States.

SWITZERLAND, 1847.

Article I.

The citizens of each one of the high contracting parties shall have power to dispose of their personal property, within the jurisdiction of the other, either by testament, donation, or *ab intestato*, or in any other manner; and their heirs, being citizens of the other

party, shall inherit all such personal estates, whether by testament or *ab intestato*, and they may take possession of the same, either personally or by attorney, and dispose of them as they may think proper, paying to the respective governments no other charges than those to which the inhabitants of the country in which the said property shall be found would be liable in a similar case; and in the absence of such heir, or heirs, the same care shall be taken of the property that would be taken in the like case for the preservation of the property of a citizen of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same; and in case any dispute should arise between claimants to the same succession as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

ARTICLE II.

If, by the death of a person owning real property in the territory of one of the high contracting parties, such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed to him to dispose of such property, and collect and withdraw the proceeds thereof, without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which such real property may be situated.

SWITZERLAND, 1850.

Article V.

The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the Canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of State or Canton will permit to sell such property; he shall be at liberty

at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which the real estate may be situated.

ARTICLE VI.

Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.

BRUNSWICK, &c., 1854.

ARTICLE I.

The citizens of each one of the high contracting parties shall have power to dispose of their personal property, within the jurisdiction of the other, subject to the laws of the State or country where the domicil is, or the property is found, either by testament, donation, or *ab intestato*, or in any other manner; and their heirs, being citizens of the other party, shall inherit all such personal estates, whether by testament or *ab intestato*, and they may take possession of the same, either personally or by attorney, and dispose of them as they may think proper, paying to the respective governments no other charges than those to which the inhabitants of the country in which the said property shall be found would be liable in a similar case; and in the absence of such heir or heirs the same care shall be taken of the property that would be taken, in the like case, for the preservation of the property of a citizen of the same country, until the lawful proprietor shall have had time to take measures for

possessing himself of the same; and in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

ARTICLE II.

If by the death of a person owning real property in the territory of one of the high contracting parties such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, such term as the laws of the State or country will permit shall be allowed to him to dispose of such property, and collect and withdraw the proceeds thereof, without paying to the Government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated.

TWO SICILIES, 1855.

ARTICLE VI.

The citizens and subjects of each of the contracting parties, residing in the States of the other, shall be entitled to carry on commerce, arts, or trade, and to occupy dwellings, shops, and warehouses, and to dispose of their property of every kind, whether real or personal, by sale, gift, exchange, or in any other way, without hindrance or obstacle. And they shall be free to manage their own affairs themselves, or to commit those affairs to persons whom they may appoint as broker, factor, or agent; nor shall they be restrained in their choice of persons to act in such capacities; nor

shall they be called upon to pay any salary or remuneration to any person whom they shall not choose to employ. Absolute freedom shall also be given, in all cases, to the buyer and seller to bargain together, and also to fix the price of any goods or merchandise, imported into, or to be exported from, the States of either of the contracting parties, save and except where the laws of the said States may require the intervention of special agents, or where, in either of the countries articles may be the subject of a government monoply, as at present in the Kingdom of the Two Sicilies, the royal monopolies of tobacco, salt, playing cards, gunpowder, and saltpetre.

ARTICLE VII.

As to any citizen or subject of either of the high contracting parties dying within the jurisdiction of the other, his heirs, being citizens or subjects of the other, shall succeed to his personal property, and either to his real estate or to the proceeds thereof, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them; and may dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country wherein the said property is, shall be subject to pay in like cases. And in case of the ebsence of the heir or of his representatives, the same care shall be taken of the said property as would be taken, in like cases, of the effects of the natives of the country itself; the respective Consular Agents having notice from the competent judicial authorities of the day and hour in which they will proceed to the imposing or removing of seals and to the making out of an inventory, in all cases where such proceedings are required by law; so that the said Consular Agent may assist thereat.

The respective Consuls may demand the delivery of the hereditary effects of their countrymen, which shall be immediately delivered to them, if no formal opposition to such delivery shall have been made by the creditors of the deceased, or otherwise, as soon as such opposition shall have been legally overruled. And if a question shall arise as to the rightful ownership of said property, the same shall be finally decided by the laws and judges of the land wherein the said property is. And the citizens and subjects of either of the contracting parties in the States of the other, shall have free access to the tribunals of justice of said States, on the same terms which are granted by the laws and usages of the country to native citizens or subjects; and they may employ, in defence of their interests and rights, such advocates, attorneys, and other agents, being citizens or subjects of the other, as they may choose to select.

HAYTI, 1864, ART. IX.

The citizens of each of the high contracting parties, within the jurisdiction of the other, shall have power to dispose of their personal property, by sale, donation, testament, or otherwise; and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases. In the absence of a personal representative, the same care shall be taken of the property as by law would be taken of the property of a native in a similar case, while the lawful owner may take measures for

securing it. If a question as to the rightful ownership of the property should arise among claimants, the same shall be determined by the judicial tribunals of the country in which it is situated.

DOMINICAN REPUBLIC, 1867, ART. V.

The citizens of each of the high contracting parties, within the jurisdiction of the other, shall have power to dispose of their personal property by sale, donation, testament, or otherwise; and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases. In the absence of a personal representative, the same care shall be taken of the property as by law would be taken of the property of a native in a similar case, whilst the lawful owner may take measures for securing it. If a question should arise among claimants as to the rightful ownership of the property, the same shall be finally decided by the judicial tribunals of the country in which it is situated.

When on the decease of any person holding real estate within the territory of one party, such real estate would by the law of the land descend on a citizen of the other, were he not disqualified by alienage, the longest term which the laws of the country in which it is situated will permit shall be accorded to him to dispose of the same; nor shall he be subjected, in doing so, to higher or other dues than if he were a citizen of the country wherein such real estate is situated.

III.

Copies of clause in above specimen Treaties together with the version in the Respective Foreign Language.

BAVARIA, 1845, ART. V.

9 U. S. St., p. 11.

If any dispute should arise between different claimants to the same inheritance, they shall be decided in the last resort, according to the laws, and by the judges of the country where the property is situated.

Wenn sich Streitigkeiten zwischen verschiedenen rechtlichen Anspruch auf die Erbschaft habenden Prätendenten erheben, so werden dieselben in letzer Instanz nach den Gesetzen und von den Richtern des Landes entschieden werden, in welchem das Object der Erbschaft sich befindet.

TWO SICILIES, 1845, ART. VI.

9 U. S. St., p. 17.

And if a question should arise among several claimants, as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.

E laddove sorgesse quistione tra molti pretendenti per l'appartenenza de'detti beni, la stassa sarà decisa diffinitivamente, secondo de leggi e da'giudici des paese ove si trovano i detti beni.

SAXONY, 1845, ART. V.

9 U. S. St., p. 42.

If any dispute should arise between the different

Wenn sich irgend eine Streitigkeit zwichen ver-

claimants to the same inheritance, they shall be decided according to the laws and by the judges of the country where the property is situated.

schiedenen dieselbe Erbschaft beansprechenden Personen erheben sollte, so soll dieselbe in Gemässheit der Gesetze und durch die Richter desjenigen Staats worin sich die Güter befinden, entschieden werden.

NASSAU, 1846, ART. V.

9 U. S. St., p. 50.

If any dispute should arise between different claimants to the same inheritance, they shall be decided, in the last resort, according to the laws and by the judges of the country where the property is situated.

Wenn sich Streitigkeiten zwischen verschiedenen, rechtlichen Anspruch auf die Erbschaft habenden Praetendenten erheben, so werden dieselben in letzter Instanz nach den Gesetzen und von den Richtern des Landes entschieden werden, in welchen das Object der Erbschaft sich befindet.

HANOVER, 1846, ART. X.

9 U. S. St., p. 63.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situate.

Wenn swischen verschiedenen Präetendenten Streit darüber entstehen sollte, wem von ihnen das besagte Vermögen gehöre, so soll selbiger nach den Gesetzen und durch die Richter des Landes, worin selbiges sich befindet, definitiv entschieden werden.

MECKLENBURG, &c., 1846, ART. X.

9 U. S. St., p. 76.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situated.

Wenn swischen verschiedenen Präetendenten Streit darüber enstehen sollte, wen bon ihnen das besagte Vermögen gehöre, so soll selbiger nach den Gesetzen und durch die Richter des Landes, worin selbiges sich befindet, definitive entscheiden werden.

SWITZERLAND, 1847, ART. I.

9 U. S. St., p. 100.

and in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

et dans le cas ou s'éléverait une question parmi les prétendans à une succession de savoir à qui les biens doivent appartenir, cette question sera décidée après les lois et par les juges du pays dans lequel les biens se trouvent.

SWITZERLAND, 1850, Art. VI.

11 U. S. St. at Large, 591.

Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.

Les contestations qui pourraient s'élever entre les prétendans à une succession, sur la question de savoir à qui les biens doivent appartenir, seront portées devant les tribunaux et juges d'après les lois du pays dans lequel la propriété est située.

BRUNSWICK, &c., 1854, Art. I.

11 U. S. St. at Large, 602.

And in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

Und sollten Streitigkeiten wegen der nachgelassenen Güter Zwischen Personen welche Erben zu sein beanspruchen, entstehen, so sollen dieselben nach den Gesetzen und von den Richtern des Landes entschieden werden, in welchem das Object der Erbschaft sich befindet.

TWO SICILIES, 1855, Art. VII.

11 U. S. St. at Large, 644.

And if a question shall arise as to the rightful ownership of said property, the same shall be finally decided by the laws and judges of the land wherein the said property is.

Laddove poi sorgesse quistione sulla spettanza di tali beni, la stessa sara decisa diffinitivamente, secondo le leggi, e da Giudici del paese dove essi sono situati.

HAYTI, 1864, Art. IX.

13 U. S. St. at Large, 714.

If a question as to the rightful ownership of the property should arise among claimants, the same shall be determined by the judicial tribunals of the country in which it is situated.

Si, parmi les prétendants, il s'éleve une contestation sur la legitimité de leur droit respectif a la propriét cette contestation sera jugée par les tribunaux de justice du pays où le bien est situé.

xxxvi

DOMINICAN REPUBLIC, 1867, Art. V.

15 U. S. St. at Large, p. 170.

If a question shall arise among claimants as the rightful ownership of the property, the same shall be finally decided by the judicial tribunals of the country in which it is situated.

Si, se suscitare cuestion entre los reclamantes sobre la legitima propiedad de los bienes, aquella sera definitivamente decidída por los tribunales de justicia del pais donde se hallaren estos situados.

IV.

Hawaiian Statute of Distributions and Final Disposition of Insurance monies paid in Administrator's action.

Hawaiian Statute of Distributions.

COMPILED LAWS OF THE HAWAIIAN KINGDOM.
[1889.]

CHAPTER XXXII.

OF THE DESCENT OF PROPERTY, BOTH REAL AND PERSONAL.

§ 1447. Whenever any person shall die intestate within this Kingdom, his property, both real and personal, of every kind and description, shall descend to and be divided among his heirs, as hereinafter prescribed.

§ 1448. The property shall be divided equally among the intestate's children, and the issue of any deceased child by right of representation, and if there is no child of the intestate living at his death, his estate shall descend to all his other lineal descendants.

IN RE ESTATE OF HENRI MCGREW.

On January 23, 1897, J. O. Carter, Administrator of Estate of H. G. McGrew, filed accounts and petitioned for a discharge.

His accounts show, among other receipts, the following:

"1896, December 19. Avails of Life Insurance Policy, $5,000."

All other receipts, including balance from old account of $56.68, amounted to $1,032.27.

Among expenditures there appears the following item:

"1896. May 11, By paid Mrs. McGrew's order, support of minor, $100."

The memo. of property on hand for delivery is as follows:

"The Administrator has in his hands for delivery to "Guardian of minor, when appointed:

"Haw. Govt. Bond, No. 472, 6%.....	$1,000 00
" do. 19.....	500 00
"Wailuku Sugar Co. bond, No. 144, 6%.....	1,000 00
"Cash in Bishop & Co.'s Bank.....	4,862 53
	$7,362 53

In the inventory of property filed by the Administrator was "Insurance Policy Mutual Life of New York, $5,000."

On March 19, 1897, the Probate Court approved the accounts and ordered the discharge of the Administrator "upon his filing the final receipt to be signed by the duly appointed Guardian of R. Brodie McGrew, the minor child and sole heir of said decedent H. G. McGrew."

The formal order concerning the heir is as follows:

"And that the said administrator do deliver over the "property remaining in his hands to the person herein-"after named. * * * The person entitled is as follows "with the respective places of residence, age, and sex: "Reynold Brodie McGrew, a minor, son of said decedent, "and now residing in San Francisco, California, U. S. "A."

On June 1st, 1897, Carter, Administrator, in writing, informed the Probate Court that no guardian had been appointed for said R. B. McGrew and asked to be allowed to pass over the estate into Court. The Court so ordered on June 3, 1897, and the Clerk of the Court, Henry Smith, receipted for the list of property above enumerated.

Later, on August 31, 1897, Chas. B. Cooper was appointed guardian of Reynold Brodie McGrew, and on September 2, 1897, receipted to said Henry Smith for said funds and property, less certain expenses, amounting to the net sum of $7,281.15.

On August 5, 1899, Cooper, guardian, filed accounts showing receipts of income from above-described property, $978.93, and expenditures, $980.56. Principal in hand, $7,600.

On March 25, 1901, further account filed showing receipts, $869.45; expenditures, $639.72. Value of estate in hand, $7,829.40.

Both accounts approved by Probate Court.

V.

Letter from French Counsel on Language Treaty.

234 Faub'g. St. Honoré.
5. 7. 1902.

Je me suis renseigné sur la jurisprudence relative á l'interprétation de la clause, que vous avez bien voulu me soumettre, du traité de 1850 entre les Etats-Unis et les Iles Hawai.

Cette clause est ainsi conçue: "And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land therein the said goods are." Je la traduis ainsi: "Et si une contestation s'élevait entre plusieurs prétendants à la propriété de ces biens, elle serait jugée en dernier ressort conformément aux lois et par les juges du pays où *sont* lesdits biens."

Au Ministère des Affaires étrangères, on n'a été en mesure de me fournir aucune indication utile. *Je me suis adressé, en outre, à monsieur André Weiss, Professeur de Droit international privé à l'Université de Paris*, qui a, en ces matières, une grande compétence et une grande autorité. Pas plus que moi, il ne connait ni jugement, ni arrêt rendu en France sur ce sujet, ce qui n'est, d'ailleurs pas surprenant, aucun de nos traités internationaux ne renfermant de clause similaire. Pour le règlement des successions, nous stipulons toujours, dans nos conventions diplomatiques, l'application du statut réel, c'est-à-dire de la loi territoriale par les tribunaux indigènes, pour les immeubles,—et du statut personnel, c'est-à-dire de la loi nationale du "de

cujus" par les tribunaux de son domicile, pour les meubles et les valeurs mobilères.

Le mot "*goods*," que j'ai traduit par "*biens*," a plus spécialement, dans le droit successoral anglais, le sens de "movable property," par opposition à "lands, tenements and hereditaments;" je suppose, cependant, que, dans la clause envisagée, il a le même sens générique que notre mot "biens" et doit s'entendre de toute sorte de propriété, mobilière ou immobilière.

Ainsi compris, nous pensons, M. Weiss et moi, que si nos tribunaux avaient à statuer sur la clause, leur interprétation sur le principe ne serait guère douteuse. Le clause contient erga omnes une attribution formelle de législation et de compétence juridictionelle; l'unique criterium semble devoir être la situation *matérielle* des biens.

Pour les immeubles et les meubles corporels, il n'y aurait pas de difficulté, la succession serait dévolue et réglée suivant les lois et par les juges du pays où ils sont situés au moment du décés. Pour les *créances* non représentés par un titre, le domicile du débiteuf serait considéré comme le lieu de la situation. Pour les valeurs résultant de titres, l'hésitation serait possible entre le lieu où existeraient les titres et celui du siège social du débiteur; cependant, nous opterions pour le premier, surtout si le débiteur y possédait une succursale où le paiement put être exigé. Il est bien entendu que le Traité ne s'applique qu'aux biens existant soit aux Etats-Unis, soit aux Iles Hawaï; pour ceux qui se trouveraient dans des pays étrangers au traité de 1850, le droit commun reprendrait son empire.

(Signed) LOUIS AYRAL.

Translation.

234 Faubg. St. Honoré,
July 5th, 1902.

I have obtained information as to judicial decisions upon the interpretation of the clause in the Treaty of 1850 between the United States and the Hawaiian Islands, which you have been kind enough to submit to me.

Said clause is worded thus:

> "And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and the judges of the land therein the said goods are."

which I translate thus:

> "Et si une contestation s' élevait entre plusieurs prétendants à la propriété de ces biens, elle serait jugée en dernier resort conformément aux lois et par les juges du pays où *sont* les dits biens."

I have not been able to get any useful points from the Ministry of Foreign Affairs, where I applied. *I have also applied to my friend André Weiss, Professor of Private International Law at the University of Paris, who is highly competent in these matters, and enjoys a great reputation as such.* This gentleman does not know, any more than I do, of any judgment or decision existing in France on this subject, which, by the way, is not surprising, as none of our international treaties contains any such clause. As regards the settlement of inheritances we always stipulate in our diplomatic agreements that the *statut réel*, that is, the territorial law, should be applied by legal tribunals in the case of real estate, whereas the *statut personnel*, that is, the national law of the *de cujus*, should be applied by the

tribunals of the place where he resides, in the case of personal property and values.

The word "goods," which I have translated by "biens," has, more specially in that part of the British law regulating inheritances, the meaning of "moveable property" in opposition to "lands, tenements and hereditaments." I suppose, however, that in the clause above referred to it has the same generic sense as our word "biens," and should be understood to signify any species of property either personal or real.

Under the circumstances, Mr. Weiss and I think that if our tribunals should be called upon to construe the clause, their interpretation, upon principle, is hardly open to doubt. The clause contains, *erga omnes* a formal legislative provision and a grant of jurisdiction; the only criterion, it seems, ought therefore to be as to where the goods are *materially* located.

As regards real estate and corporeal personal property, there would be no difficulty, the inheritance would be settled according to the laws and through the instrumentality of the judges of the land where they are located at the time of the demise. As regards debts not represented by a document of title, the domicile of the debtor would be considered as the location. Regarding securities represented by documents of title there may be room for discussion between the place where the said documents are found and the place where the debtor's business domicile is located; we should, however, decide in favor of the former, especially if the debtor had there a branch office at which the payment could be demanded. It goes without saying that the treaty applies only to goods existing either in the United States or in the Hawaiian Islands. As regards those which should exist in lands not named in the Treaty of 1850, common law would resume its sway.

LOUIS AYRAL.

IN THE

Supreme Court of the United States.

MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
ALPHONSINE McGREW,
Defendant in Error.

No.

MOTION TO DISMISS WRIT OF ERROR.

To the Mutual Life Insurance Company, plaintiff in error, and Chickering & Gregory, Esqs., Edward Lyman Short, Esq., attorneys for plaintiff in error.

Now comes the defendant in error by her counsel appearing on her behalf and moves the Court to dismiss the writ of error herein for the following reasons, to-wit:

That this Court has no jurisdiction to entertain this writ of error, because

(1) No federal question was specially set up or claimed in the State Court that tried this case;

(2) No federal question was necessarily, or at all, involved in the decision of this case.

The defendant in error also moves to affirm the decision of the Supreme Court of California herein, on the ground that it is manifest that the writ of error herein was taken for delay, and further, upon the ground that the question on which it is sought to base the jurisdiction of this Court is so frivolous as not to need further argument.

The argument in support of this motion is hereto attached.

RICHARD BAYNE,
H. G. PLATT,
Attorneys for Defendant in Error.

PLATT & BAYNE,
Of Counsel.

Statement of the Case

This was an action brought by the defendant in error against the plaintiff in error in the Superior Court of the City and County of San Francisco, State of California, upon a policy of insurance issued by the plaintiff in error upon the life of Henry McGrew, the husband of the defendant in error, and made payable upon his death to the defendant in error. This policy was issued in Honolulu, Hawaiian Islands, on the 14th day of September, 1892, while said defendant in error and said Henry McGrew were husband and wife, and were there residing. It was payable in New York.

The plaintiff in error pleaded in defense to said action,

(1) That prior to the death of said Henry McGrew the latter became of unsound mind, and a guardian of his person and estate was appointed in proceedings instituted in Honolulu;

(2) That this guardian instituted in Honolulu proceedings for a divorce of said Henry McGrew from defendant in error on the ground of adultery, and that upon the 23rd day of August, 1894, a judgment was entered in said divorce proceedings granting said divorce for said cause;

(3) That by virtue of the laws of the Hawaiian Islands, when a decree of divorce is granted on the ground of adultery of the wife, the husband shall

hold her personal estate forever, and that under said law and said decree of divorce said policy of insurance became the absolute property of said Henry McGrew.

(4) That subsequent to the death of said Henry McGrew the administrator of his estate commenced in Honolulu an action on said policy against said plaintiff in error, and recovered judgment for the amount of said policy;

(5) That said plaintiff in error had paid to the said administrator of the estate of said Henry McGrew the amount of said judgment.

The defendant in error recovered judgment in said Superior Court in the City and County of San Francisco for the amount of said policy, and plaintiff in error appealed therefrom to the Supreme Court of the State of California.

In the Supreme Court of the State of California the plaintiff in error for the first time set up, *but only in its brief*, Art. VIII of the Treaty of November 9th, 1850, between the United States of America and the Kingdom of Hawaii.

The Supreme Court affirmed the judgment of said Superior Court in favor of the defendant in error, but in its opinion made no reference to this treaty or to any rights arising thereunder.

From this judgment of the Supreme Court the plaintiff in error has taken out a writ of error to this Court upon the alleged ground that a federal question is in-

volved in this case, to-wit: That said plaintiff in error had claimed in said Superior Court and in said Supreme Court that, by a treaty concluded between the United States and the Kingdom of Hawaii, it was provided: "That if a question should arise among several claim-"ants as to which of them said goods belonged, the "same shall be decided finally by the laws and judges "of the land wherein said goods are", and that under said Hawaiian laws and said decree of divorce and said judgment rendered by said Hawaiian Court the title to said policy had been decided in accordance with said treaty, and that therefore plaintiff in error was deprived by said California judgment of a right, title, privilege or immunity under said treaty.

Argument.

This writ should be dismissed for want of jurisdiction in this Court to entertain it, because no federal question was *specially set up or claimed in the trial Court.*

This Court has held in numerous cases that a right, title, privilege or immunity under the Constitution or laws of the United States, or under a treaty, *must be especially set up or claimed at the proper time and in the proper way.*

Oxley Stave Co. vs. *Butler Co.*, 166 U. S. 695;
Chapin vs. *Fye*, 179 U. S. 129;
Columbia Water Power Co. vs. *Columbia Electric Company*, 172 U. S. 488;
Brown vs. *Massachusetts*, 144 U. S. 579;

Baldwin vs. *Kansas*, 129 U. S. 57;
Chappell vs. *Bradshaw*, 128 U. S. 134;
Brooks vs. *Missouri*, 124 U. S. 394;
Spies vs. *Illinois*, 123 U. S. 181.

The proper time and the proper way for setting up this right is in the trial Court.

If a party intends to invoke some treaty for the protection of his rights he must so declare in the trial Court. It is not sufficient that his purpose to assert a right under a treaty should be left to mere inference, or that it may be inferred argumentatively from the facts stated in the pleadings.

Zadig vs. *Baldwin*, 166 U. S. 488;
Oxley Stave Co. vs. *Butler Co.*, 166 U. S. 655;
Chapin vs. *Fye*, 179 U. S. 129;
Capital Bank vs. *Cadiz*, 172 U. S. 431.

It is fatal to the jurisdiction of this Court if a party defers until he files his briefs in the State Supreme Court the setting up of such a right, title or privilege, as the mere arguments of counsel form no part of the record.

Zadig vs. *Baldwin*, *supra*;
Parmelee vs. *Lawrence*, 78 U. S. 37;
Baldwin vs. *Kansas*, 129 U. S. 57;
Loeb vs. *Columbia Twp. Trustees*, 179 U. S. 483;
Sayward vs. *Denny*, 158 U. S. 183.

The same reasoning for a long while excluded the opinion of the State Supreme Court from the record. But, though this rule has been relaxed as to this opinion, and it now forms part of the record to be examined,

still it cannot supply what should be shown by a bill of exceptions, an agreed statement of facts, or the pleadings.

Loeb vs. *Columbia Twp. Trustees*, 179 U. S. 485.

In *Armstrong* vs. *Athens*, 16 Pet. 281, it was held that where the federal question does not appear from the record to have been raised by express averment or by necessary intendment in the pleadings in the trial Court, or by the direction given by the trial Court and stated in an exception, it must be entered in the record of the Appellate Court that it was in fact raised and decided; and this entry must appear to have been made by the order of the Court, or by the presiding Judge by order of the Court, and certified by the clerk, as a part of the record in the State Court.

In the case at bar not only was this treaty right not set up in the trial Court, nor included in the assignment of errors taken up to the Supreme Court, but it is not even mentioned in the opinion of the State Supreme Court. It appears only in the briefs in the Supreme Court.

The rule that, if the decision of a federal question was necessarily involved in the case, the fact that it was not specially set up and claimed is not conclusive against a review of such question by the Supreme Court of the United States does not apply to the third class of cases specified in section 709 Rev. Stats. to which class the case at bar belongs.

Yazoo vs. *Adams*, 180 U. S. 14;

Water Power Co. vs. *Street Ry. Co.*, 172 U. S. 488.

If, however, it did apply to this third class, it would not apply to the case at bar because

(1) *It does not appear from the record that the treaty in question was in any way involved in the decision.*

Barring the briefs of counsel filed in the Supreme Court of the State of California, and which are no parts of the record, and the petition of the Insurance Company for a writ of error, which is also no part of the record, there is nothing in this record to show that either in the trial Court or in the Supreme Court of the State of California the Hawaiian Treaty in question was ever considered by either Court, or in any way called to their attention. The opinion of the State Supreme Court did not mention it. This latter Court explicitly referred to the Honolulu decree of divorce, and referred to it as one * * * "which could not have " been obtained here; *and upon a Hawaiian statute* " *which has no force here except by comity*", thus showing by the last words, "by comity", that it was not considering a right under the treaty. That court in its judgment accorded full force and effect to the decree of divorce, likewise to the Hawaiian statute, *but rested its decision on the fact that the defendant in error was not affected by the statute*, by reason of the fact that she was not a resident of nor domiciled in Hawaii at the time the statute could have operated had she been there, but that on the contrary at that time she was domiciled in California, and hence that the Hawaiian statute " had no operation upon her or her personal property

" here; for the law which governs personal property is " the law of the domicile". "In our opinion", said the Court, "the respondent at the time when the Hawaiian " statute took effect was domiciled in California.

(2) *The treaty does not apply to this case.*

Article VIII of the treaty between the United States and the Kingdom of Hawaii, from which article the plaintiff in error has quoted the particular clause upon which it relies, is as follows:

> "The contracting parties engage in regard to the personal privileges that the *citizens of the United States of America* shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands, and the *subjects of his said Majesty* in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to dispose of their personal property of every kind and description, etc., etc., and their heirs or representatives, being *subjects or citizens of the other contracting party*, shall succeed to their personal *goods*, whether by testament or *ab intestato*, and may take possession thereof by themselves or others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said *goods* are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care shall be taken of the said *goods* as would be taken of the *goods* of a native of the same country in like case until the lawful owner may take measures for

receiving them. *And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.* * * * Where on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land descend on a *citizen or subject of the other*, were he not disqualified by alienage, such *citizen or subject*, etc. * * *

"*The citizens or subjects of the contracting parties* shall not be obliged to pay, under any pretence whatever, any taxes or impositions other or greater, etc., * * * and each of the two contracting parties engages that *the citizens or subjects of the other* residing in their respective states shall enjoy their property, etc., etc."

Article IX also provides as follows:

"*The citizens and subjects of each of the two contracting parties* shall be free in the states of the other to manage their own affairs, etc."

This treaty does not apply to the case at bar because (*a*) *The treaty was intended to protect only the citizens of the United States and the subjects of the Hawaiian Kingdom, and there is nothing in the record that shows or attempts to show that the defendant in error was a citizen of the United States or a subject or citizen of Hawaii, or that her husband Henri McGrew, or the administrator of his estate, was a citizen or subject of either country.*

The record shows only that Henri McGrew was a *resident* of Honolulu, and that the defendant in error at the date of the divorce was a *resident* of California. It

may be that they were all *citizens* of France, or *subjects* of Great Britain, or of any other country. If such were the fact, the treaty surely could not apply.

The burden of proving that the "*claimants*" in this case are covered by this treaty was upon plaintiff in error, if it intended to claim a right thereunder. In the absence of such showing it can not be said that this treaty right was at all involved in the judgment of the State Court.

(*b*) *This policy of insurance is not covered by the terms of the treaty.*

The treaty provides that the title to any "*goods*" shall be decided by the laws and judges of the country "wherein the said *goods* are".

The object of this Treaty was to make it certain that as to corporeal personal property the title should be governed, not by the law of the domicile of the owner, but by the law of the bodily *situs* of the thing itself. Throughout the Treaty the word "goods" is used in this limited sense.

Article II provides as follows:

> "No duty of customs or other import shall be charged upon any *goods*, *the product or manufacture of one country*, upon importation from such country into the other, other or higher than the duty or import charged upon *goods* of the same kind, the *product or manufacture of*, or imported from any other country."

Article III provides as follows:

> "All *goods* which can legally be exported or

> re-exported from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, etc., etc., etc., whether exported in ships of the other; and all *goods* and articles of whatever description, not being of the produce or manufacture of the United States, etc., etc., etc."

Article VIII uses the word "goods" in the same sense. This term was clearly not intended to cover intangible property, such as a policy of insurance, as it cannot be said to be *in any land*, but must be in the owner thereof, whereas a horse, a piano, a barrel of sugar, necessarily has a corporeal *situs*, which may be different from the *situs* of its owner.

An insurance policy is simply evidence of a debt, payable upon a contingency (*16 Am. & Eng. Enc. of Law*, 843), an intangible thing, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person (*People* vs. *Eastman*, 25 Cal. 604). This distinction between the actual *situs* of a corporeal chattel and of intangible personal property is clearly pointed out by the Supreme Court of California in *Estate of Fair*, 128 Cal. 612. The question at issue was the taxation of certain railroad bonds that were not physically present in California, but were physically in the State of New York. It was contended that they were not taxable in California, as its constitution provided for taxing only "all property *in the State*". The Court held that "intangible personal property has no " *situs* apart from the domicile of the owner * * *

" that not the paper writing, but the obligation to pay " is the thing of value, and in the nature of things this " can have no actual locality". This Court has said the same thing. In *Kirtland* vs. *Hotchkess*, 100 U. S. 498, it said that a "debt, although a species of intangible " property, may, for the purposes of taxation, *if not for* " *all others*, be regarded as situated at the domicile of " the creditor", and that a bond, "wherever actually " held or deposited, is only evidence of the debt". This holds equally true as to an insurance policy. It therefore is not included in the term "*goods*" as used in the Treaty, as the object of this treaty was to provide for the determining of conflicting claims to the title to tangible personal property by the law of their corporeal *situs*.

(c) *No "question has arisen among several claimants as to which of them said goods belong".*

The defendant in error was not a party to the suit upon the policy in Honolulu, and the administrator of the estate of Henri McGrew was not a party to the suit upon the policy in California. There was no *question* in Honolulu "*among several claimants*" as to which of them this policy belonged. There has been no *question* in California "*among several claimants*" as to which of them this policy belonged, and the insurance company has never claimed to be the owner of the policy. The contingency that would bring the treaty into operation therefore has never arisen.

It will be claimed that this interpretation would deprive the plaintiff in error of any rights under this treaty. If this be a hardship, it is due solely to the language of the treaty, which was never intended to apply to such a case as the one at bar.

(*d*) *If there has been any determination of the ownership of this policy between several claimants, then, by the California judgment, the ownership of this policy has been "finally decided by the laws and judges of the land wherein the said goods are".*

The decision of the State Court that the domicile of the defendant in error at the time of the divorce was in California, though a non-federal question, is in line with the views of this Court upon this subject. In *Anderson* vs. *Watt*, 138 U. S. 706, *Cheever* vs. *Wilson*, 19 Wall. 108, 123, 124, this Court recognized the doctrine laid down by the Supreme Court of California in this case as to the ability of a wife to obtain a separate domicile "in *those cases where the express object of all* " *proceedings is to show that the relation itself ought to* " *be dissolved or so modified as to establish separate in-* " *terests*".

This is such a case. The wife was ejected from her home, she was deprived of all support, and a suit for divorce was instituted. The *fact* of the one domicile of husband and wife was at an end, and the fiction of this unity of domicile ceased when the husband discarded his wife by ejecting her from his home and instituting

proceedings for the dissolution of the bonds of matrimony.

Atherton vs. *Atherton*, U. S. Sup. Crt. (Advance sheets, May 15, 1901, p. 547), is not in conflict.

There is no question as to the jurisdiction of the Honolulu Court in the divorce proceedings in the case at bar. The defendant in error appeared in that case, and jurisdiction was thereby acquired, independent of her domicile. At that time such was her domicile. But after the husband had excluded her from his home, actually turned her adrift on the world, refused her both home and support, she could then change her domicile as she pleased. The husband could not claim the benefit of the fiction of one domicile, and at the same time escape its burdens.

If the defendant in error was domiciled in California at the time of the decree of divorce, the Hawaiian law forfeiting her title to this policy of insurance could not under the treaty take effect, because it was not *the law of the land wherein the said policy was*. The law of the land wherein the said policy was situate, was the law of California, where the owner of the policy was domiciled.

It may be claimed that as this insurance policy was delivered in Honolulu, the contract being made there, it was therefore a Honolulu contract, and must be governed by the laws of Hawaii (*Mutual Life* vs. *Cohen*, 21 Sup. Crt. Rep. 106). This may be conceded as to the construction of the contract of insurance, but it has

no application to a question dehors the contract, to-wit: the question of ownership of the contract. The construction of this policy was not before the Hawaiian or California Court. On its face it was payable to the defendant in error. The only question was whether the Hawaiian law worked an involuntary assignment thereof, a matter entirely dehors the policy.

We therefore respectfully submit that this writ of error should be dismissed.

(a) Because no federal question was especially set up or claimed at the proper time or in the proper way; and

(b) Because no federal question was involved in the decision of the State Court.

Respectfully submitted,

RICHARD BAYNE,
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Attorneys for Defendants in Error.

PLATT & BAYNE,
of Counsel.

14509

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
ALPHONSINE McGREW,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error herein duly moved this court to dismiss this Writ of Error, and this court continued the hearing of said motion until the hearing of this appeal on its merits. We will, therefore, for the convenience of the court, repeat herein our printed argument on said motion, with such enlargement as a more thorough investigation has permitted.

Statement of the Case.

This was an action brought by the defendant in error against the plaintiff in error in the superior court of the City and County of San Francisco, State of California, upon a policy of insurance issued by the plaintiff in error upon the life of Henry McGrew, the hus-

band of the defendant in error, and made payable upon his death to the defendant in error. This policy was issued in Honolulu, Hawaiian Islands, on the 14th day of September, 1892, while said defendant in error and said Henry McGrew were husband and wife, and were there residing. It was payable in New York.

The plaintiff in error pleaded in defense to said action:

(1) That prior to the death of said Henry McGrew the latter became of unsound mind, and a guardian of his person and estate was appointed in proceedings instituted in Honolulu;

(2) That *this guardian* began in Honolulu proceedings for a divorce of said Henry McGrew from defendant in error on the ground of her adultery, and upon the 23rd day of August, 1894, a judgment was entered in said divorce proceedings granting said divorce for said cause;

(3) That by virtue of the laws of the Hawaiian Islands, then in force, when a decree of divorce is granted on the ground of the adultery of the wife, the husband shall hold her personal estate forever, and under said law and said decree of divorce said policy of insurance became the absolute property of said Henry McGrew;

(4) That subsequent to the death of said Henry McGrew the administrator of his estate commenced in Honolulu an action on said policy against said plaintiff in error, and recovered judgment for the amount of said policy;

(5) That plaintiff in error had paid to the said administrator of the estate of Henry McGrew the amount of said judgment.

The trial court held that no testimony as to said action on said policy or as to the payment of the judgment given therein was admissible, as defendant in error was not a party to said action and, consequently, was not bound thereby.

The defendant in error recovered judgment in said superior court for the amount of said policy, and plaintiff in error appealed therefrom to the supreme court of the State of California.

In the said supreme court the plaintiff in error for the first time set up, but only in its *brief and petition for rehearing*, Art. VIII of the Treaty of November 9th, 1850, between the United States of America and the Kingdom of Hawaii, and claimed rights thereunder.

The supreme court affirmed the judgment of said superior court in favor of the defendant in error, but in its opinion made no reference to this treaty or to any rights arising thereunder.

From this judgment of the supreme court the plaintiff in error has taken out a writ of error to this court upon the alleged ground that a federal question is involved in this case, to-wit: That said plaintiff in error had claimed in said superior court and in said supreme court that, by a treaty concluded between the United States and the Kingdom of Hawaii, it was provided "That if a question should arise among several claim-"aints as to which of them said goods belonged, the "same shall be decided finally by the laws and judges

" of the land wherein said goods are", that under said Hawaiian Statute and said decree of divorce and said judgment rendered by said Hawaiian Court the title to said policy had been decided to be in the said Henry McGrew, that this title was protected by said Treaty, and that therefore plaintiff in error was deprived by said California judgment of a right under said Treaty.

Motion to Dismiss.

The defendant of error moves this court to dismiss this writ in error on three grounds:

I.

There is no federal question in this case.

II.

No federal question was specially set up or claimed in either the California trial or appellate court, as required by the third clause of Section 709 of the Revised Statutes.

III.

No federal question was necessarily or at all involved in the decision of the California court, nor is any apparent in the record.

I.

There is no federal question in this case, because plaintiff in error did not claim *in or for itself* any right under the treaty.

Plaintiff in error here does not claim *in or for itself* any right under the treaty with Hawaii, or any right which is protected by that treaty, but only that a *third*

person has a right under that treaty, or which is protected thereby, and that, by virtue of such alleged right, such *third person*, and not the defendant in error, is the owner of, and entitled to the subject matter of this action, to-wit, said policy of insurance and the money due thereon; and therefore, that said *third person*, and not the defendant in error, is entitled to have and recover the amount of said policy from plaintiff in error. Hence, plaintiff in error is not asserting a right *in itself* under the treaty, but in a *third person*; which, if established, might be a defense in the State court, but presents no federal question.

In *Owings* vs. *Norwood*, 5 Cranch. 344, which was an action of ejectment, the defendant set up title in a third party, and claimed that said title in said third party was protected by the treaty between the United States and Great Britain, and took out a writ of error to this court from the judgment against him, claiming that he had been denied a right under a treaty. This court held that in order to vest jurisdiction in this court under Section 709, a party must *for himself* claim a right, title, privilege or immunity under the Constitution or an Act of Congress or a treaty, and that it is not sufficient to assert title, etc., thereunder in a *third person* merely, under whom the party does not claim any interest, and which third party is not a party to the action. The court held that the defendant in ejectment was entitled to set up title in a third party, but that this was by virtue of *the State law* and not by virtue of any treaty.

This rule was affirmed in

Verden vs. *Coleman*, 1 Black 472;

Henderson vs. *Tennyson*, 10 How. 323;
Hale vs. *Gaines*, 22 How. 160;
Giles vs. *Little*, 134 U. S. 650;
Tyler vs. *Judges*, 179 U. S. 407.

In *Giles* vs. *Little* this court said:

> "It is well settted that in order to give this court jurisdiction to review a judgment of the State court against a title or right set up or claimed under a statute or an authority exercised under the United States, that title or right must be one of the plaintiff in error, not of a third person only."

In the case at bar the plaintiff in error, the insurance company, cannot claim for itself any right or title under the treaty any more than could the defendants in any of the above cases.

In *Verden* vs. *Coleman*, *supra*, which was an action to foreclose a mortgage, the mortgagee pleaded as a defense that the mortgage had been executed to secure the purchase money of the land, and that at the time of the purchase of the land and the execution of the mortgage the title was not in the vendor and mortgagee, but in a third party by virtue of a treaty, and that therefore he had a complete defense by virtue of a treaty. The court held that the defendant did not himself claim under the treaty, but was setting up the title in a third person, which he alleged was protected by the treaty, but that neither this third person nor his heirs had any interest in the suit, nor could their rights be affected by the decision in the case, and therefore the court had no jurisdiction by reason of any treaty.

In the case at bar the plaintiff in error was sued in Honolulu upon this policy by the administrator of the estate of the husband of defendant in error, who might under certain circumstances have claimed under the treaty. It did not interplead the defendant in error nor did it pay the money into court and seek its discharge; but it defended the action, to which defendant in error was not a party, and perhaps lost and paid the judgment. There is, however, no evidence as to this judgment and payment, as the court ruled the evidence upon such matters incompetent and refused to admit the same. But, whether there was such judgment or not, the said judgment bound the insurance company alone, and in paying it, if it did pay it, it paid simply its own liability as adjudged in that proceeding. Its duty was and is simply contractual.

Under this contract defendant in error was the payee. It is alleged, but not proven, that in an action to which said defendant was not a party, the title to this policy was litigated between plaintiff in error and a *third* party, and decided in favor of said *third* party, but this was not binding upon defendant in error. The title to this policy, as between said third party and said defendant in error, was not determined by this judgment, and plaintiff in error cannot set up this judgment against defendant in error for any purpose. If said third party has any title to this policy which is protected by this treaty, plaintiff in error cannot set it up so as to give this court jurisdiction, as it has no right in itself to this policy which is protected by the treaty or otherwise.

In *Owings* vs. *Norwood*, *supra*, this court said:

> "The plaintiff in error does not contend that his right grows out of the treaty. Whether it is an obstacle to the recovery of defendant in error is exclusively a question for the decision of the courts of Maryland."

In the case at bar the plaintiff in error cannot successfully contend that its right grows out of the treaty. Whatever right the husband of defendant in error had by virtue of the decree of divorce and the statute, might have been an obstacle to the recovery by said defendant in error, but whether it was or was not a question exclusively for the decision of the courts of California.

In *Verden* vs. *Coleman*, *supra*, which, as we have said, was an action for the foreclosure of a mortgage, and in which the mortgagor pleaded that the mortgage was to secure the purchase money of the land, and that the title to the land was bad because pursuant to a treaty it had vested in a third person, an Indian, and that therefore plaintiff, the mortgagor, should not recover, the court said:

> "Nor can we claim jurisdiction of the case because of the title set up under the treaty with the Indians, because neither the Indian claimant, nor any one claiming under him is a party to the suit."

In the case at bar this court cannot claim jurisdiction because the title to this policy, which had vested in the husband of defendant in error, was protected under the treaty, as neither the husband nor his heirs, nor anyone claiming under him, is a party to this suit.

In *Harrison* vs. *Tennessee*, *supra*, which was an action of ejectment in which the defendant relied upon an outstanding title in a third person, which he claimed was protected by a treaty, this court said:

> "The right to make this defense is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger and bar the action. It is true that the title set up in this case was claimed under a treaty, but to give jurisdiction to this court, the party must claim the right *for himself*, not for a third person, in whose title he has no interest."

In the case at bar the law of California and not the treaty gave plaintiff in error the right to plead in defense that the defendant in error was not the owner of the policy, and that she was not entitled to recover thereon by reason of the alleged fact that title thereto had passed to her husband by virtue of the decree of divorce and the Hawaiian statute, and which right in the husband was protected by the treaty. But that was merely asserting a right under this treaty, or which was protected by the treaty, *in a third person*, and not at all a right in the plaintiff in error. It had and has no claim or title of any kind whatever that is protected by any treaty; nor has it acquired any from such third person. It did not take an assignment of the policy from the husband or his representative, nor was it subrogated to them by the payment of the policy to them. Subrogation takes place when one, for his own protection, pays a debt which some one else ought to pay (*Randall* vs. *Duff*, 107 Cal. 35). In this case the plaintiff in error did not pay any debt which some one

else ought to pay, but has simply paid its own debt to the wrong person, if it has paid it. The fact that in an action, to which defendant in error was not a party, a third person had acquired an adverse judgment against plaintiff in error, and that it had paid such judgment, if there ~~was~~ were such a judgment and payment, was entirely immaterial in this action, as neither of those things, nor both of them together, would or could or did assign the rights of such third person to plaintiff in error, or subrogate it to the rights of such third party under the treaty. There was no relationship of surety or trust or any other matter which would give ground for the enforcement of the doctrine of subrogation. On the contrary, the case would be analogous to that of a third party recovering in an action of replevin a judgment against plaintiff in error for a specific chattel; and subsequently the defendant in error suing plaintiff in error for damages and for taking and detaining the same chattel. Undoubtedly the latter action might be defended on the ground that there was no right or title in the defendant in error, and the right of the third person might be set up, but such defense would be made under the State law. The right to make it would not be conferred by this treaty, even though as against the defendant in error the third party might invoke such treaty *in a contest between them* as to the ownership of such chattel.

Hence, while as a matter of defense, in the state court, the plaintiff in error was entitled to show title, if it could, in the husband of defendant in error, yet such defense was made under the law of California. It could not give this court jurisdiction to entertain this

writ of error, by pleading the husband's right to this policy and its protection by this treaty. To accomplish this it must plead in itself some right to this policy secured by this treaty, and that it did not do. It could not plead any right to this policy by virtue of the judgment rendered in Honolulu in the action to which defendant in error was not a party, nor by virtue of the payment of said judgment, because said defendant was not bound by such judgment or the payment thereof.

It therefore follows that there is no federal question in this case because of said treaty, and no attempt is made to deduce such a question from any other source.

II.

This writ should be dismissed for want of jurisdiction in this court to entertain it, because no federal question was specially set up or claimed in the California courts.

1. THIS WRIT OF ERROR IS TAKEN UNDER THE THIRD CLAUSE OF SECTION 709 OF THE REVISED STATUTES.

The *first two* clauses include cases where is drawn in question the validity of a treaty or statute of, or authority exercised under the United States, and the decision is against its validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. The *third* clause includes only those cases where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission or authority exercised under the United

States, and the decision is against the title, right, privilege or immunity *specially set up or claimed* by either party under such constitution, treaty, statute, commission, or authority.

It will be noticed that the words "*specially set up or claimed*" are used only in the *third* clause. Therefore, in *Tyler* vs. *Judges*, 179 U. S. 408, this court said:

> "It is true that under the third clause of Section 709, where a title, right, privilege or immunity is claimed under a federal law, such title etc. must be '*specially set up or claimed*', and that no such provision is made as to cases within the *second* clause, involving the constitutionality of State statutes or authorities."

In a still more recent case this court held that in cases arising under the *first* and *second* clauses of this section the federal question need not necessarily be *specially set up and claimed*, if it *appears in the record and was decided*, or if such question was *necessarily* involved in the case, and the case could not have been decided without deciding such question, *but that in cases arising under the third clause*

> "the federal right, title, privilege or immunity *must be, with possibly some rare exceptions, specially set up or claimed* to give this court jurisdiction".
>
> *Water Power Co.* vs. *Columbia*, 172 U. S. 488.

This distinction between cases arising under the *first* and *second* clause of Section 709, and those arising under the *third* clause of said section, must be kept in mind in considering the decisions upon this section, or much confusion will arise.

In *Yazoo* vs. *Adams*, 180 U. S. 14, this court again referred to this distinction, and said—

> "It is only in cases arising under the *third* clause of the section where a right, title, privilege or immunity is claimed, 'that the federal question must be *specially set up*'."

As this is the last enunciation of the rule of this court in cases arising under this section of the Revised Statutes, we must conclude that this writ must be dismissed unless the *record* shows that some right, title, privilege or immunity under the treaty in question was *specially set up or claimed*, or unless this case is shown to be a *rare exception* to this rule.

This, of course, does away with the contention of plaintiff in error that such a federal question can be raised by *inference or implication*, which contention is flatly refuted by the statement of this court in *Oxley Stave Co.* vs. *Butler*, 166 U. S. 655, that

> "The purpose of a party to assert a federal right cannot be left to mere *inference*", "that the jurisdiction of this court to re-examine the final judgment of a State court cannot arise from a mere *inference*."

See also *Green Bay* vs. *Patten Paper Co.*, 172 U. S. 67.

2. THIS COURT HAS HELD IN NUMEROUS CASES THAT A RIGHT, TITLE, PRIVILEGE OR IMMUNITY UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES, OR UNDER A TREATY, MUST BE ESPECIALLY SET UP OR CLAIMED AT THE PROPER TIME AND IN THE PROPER WAY.

The *proper time* and the *proper way* for *setting up* this right is in the *trial court*.

This right, title or privilege must not only be *specially set or claimed*, but it should be *specially set up* in the *trial court*.

In *Spies* vs. *Illinois*, 123 U. S. 181; *Baldwin* vs. *Kansas*, 129 U. S. 57, and *Miller* vs. *Texas*, 153 U. S. 538, this court held that the federal question must be specially set up in the *trial* court, and said:

> "As the supreme court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned."

In *Parmalee* vs. *Lawrence*, 11 Wall 39, this court said that the federal question

> "Must appear in the pleadings in the suit, or from evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court."

(3) IT CANNOT BE FIRST SET UP IN THE ARGUMENT IN THE STATE SUPREME COURT.

It is fatal to the jurisdiction of this court if a party defers, until he files his briefs in the State supreme court, the setting up of such a right, title or privilege, *as the mere arguments of counsel form no part of the record.*

It is true that this court in *Oxley Stave Co.* vs. *Butler*, 166 U. S. 655, quoted with approval the following from its opinion in *Maxwell* vs. *Newbold*, 18 How. 516:

> "The questions raised and decided in the State circuit court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United

States. Undoubtedly this did not preclude the plaintiffs in error from raising the point in the supreme court of the State, *if it was involved in the case as presented to that court.*"

But this court had in mind, in making this statement, the raising of the point in the State supreme court by incorporating it in the record submitted to that court as one of the assignments of errors taken to the rulings of the trial court. This court did not mean that such a question can be presented to the State supreme court only in the *oral or printed arguments.*

In *Baldwin* vs. *Kansas*, 129 U. S. 57, this court said:

> "In the present case the record does not show at the trial before the jury any right, title, privilege or immunity under the Constitution of the United States was specially set up or claimed. No objection was taken to the form of the oath at the trial, nor at the making of the motion for a new trial before the trial court, nor at the making of the motion in arrest of judgment. *The point was first suggested in the supreme court of the State.* The court, as it appears, refused to consider the objects on the ground that it was not taken at the trial. *For that reason we also cannot consider it.*"

This court has held that it will not take jurisdiction of a writ of error under Section 709, if the federal question is first raised in the *argument in* the State supreme court. In *Zadig* vs. *Baldwin*, 166 U. S. 488, it said:

> "The contention that there was a federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing *brief* of counsel presented to the supreme court of the State, in which such a federal question is discussed, and it is asserted orally at bar that in the oral *argument* made in the supreme

> court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a federal question when no such question was *necessarily* decided below, and the record does not show that such issues were set up or claimed *in any proper manner* in the courts of the State."

In *Sayward* vs. *Denny*, 158 U. S. 183, this court stated that in regard to writs of error under the third clause of Section 709 certain propositions were settled:

> "Among which was the proposition that the *arguments of counsel* form no part of the record upon which action is taken in this court," and also that "the right on which the party relies must have been called to the attention of the court in *some proper way*."

In *Parmalee* vs. *Lawrence*, 11 Wall 49, this court said that if the record does not show that a federal question was necessarily drawn in question,

> "This court cannot entertain jurisdiction to reverse the decision of the highest court of a State upon the ground that counsel brought it in question *in argument*."

This does away with the contention of plaintiff in error that it is necessary only that the federal question be called to the attention of the State court in any way whatever. In this regard plaintiff in error seems to claim that the test is simply whether the mind of the State court was directed to the right claimed. If this were the only test this court would never have held that the certificate of the presiding judge that a federal question was raised in the argument before the State supreme court cannot sustain its jurisdiction to entertain such a writ of error.

Parmalee vs. *Lawrence*, 11 Wall 49;
*Gulf etc. R. R. Co.*vs. *Hewes*, U. S. supreme court. Decided Nov. 18, 1901 (Advance Sheets, Dec. 16th, 1901).

A printed brief in the supreme court is no more than an argument, and shows no more than the certificate of the Chief Justice that the federal question was raised in the argument.

Appellant seeks to avoid the effect of these decisions by contending that the briefs filed in the supreme court of California are a part of the record because they are among the papers to which the clerk of said court has attached his certificate that "the preceding and annexed " is a true and correct copy of records". The same argument would make the " petition for writ of error" a part of such record which this court must consider, as it also is amongst the papers so certified, and yet it cannot be claimed that such a petition is a part of the record upon which action can be taken in this court (*Sayward* vs. *Denny*, 158 U. S. 183).

That the briefs in the State supreme court are not a part of such record is especially apparent from the opinion of this court in *Sayward* vs. *Denny*, *supra*, holding that the arguments of counsel form no part of such record, though the *opinions* of the State courts are now made so by rule.

Loeb vs. *Columbia*, 179 U. S. 485.

The same rule applies to the petition for rehearing, unless the State court considers and decides the federal question raised therein.

Capital Bank vs. *Cadiz*, 172 U. S. 431;
Mallet vs. *North Carolina*, 181 U. S. 592.

By analogy, we may refer to the decisions under Section 5 of the Judiciary Act of March 3, 1891, providing for writs of error from the district or circuit courts in any case involving the construction or application of any law of the United States.

In *W. U. Tel. Co.* vs. *Ann Harbor*, 178 U. S. 243, this court said:

> "It must *appear on the record, by a statement in clear and logical form, such as is required in good pleading*, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground."

In *Ansbro* vs. *U. S.*, 159 U. S. 697, this court said:

> "A case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a *definite issue* in respect to the possession of the right *must be strictly deducible from the record*, before the judgment of the court below can be revised on the ground of error in the disposal of such claim by its decision."

In *Muse* vs. *Arlington*, 168 U. S. 435, this court said, after quoting the above:

> "The *same rule* is applicable in respect of the *validity or construction of a treaty*. Some right, title, privilege or immunity dependent on the treaty must be so *set up or claimed* as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted. *The general doctrine has been frequently announced in cases involving the jurisdiction of this court under Section 709 of the Revised Statutes.*"

(4) Under the foregoing decisions this writ of error must be dismissed, unless plaintiff in error shows that this case is one of the rare exceptions to the rule laid down in *Water Power Co.* vs. *Columbia*, *supra*. It will not help plaintiff in error to argue that it is sufficient that a federal question appears in the record, and was decided against it, or that such decision was necessarily involved in the case, and that the case could not have been determined without deciding such question. It must show that the particular federal question relied upon, to-wit, a right under the treaty, was *specially set up or claimed at the proper time and in the proper way*, or that this case is one of the *rare exceptions* to this rule.

It may be that the court might have taken judicial notice of this treaty, and of the particular clause thereof under which plaintiff in error claims, and that thereby a federal question *might have been raised*. But this court has repeatedly held that it will take jurisdiction only when a federal question was *actually raised and decided*, not when it simply *might have been raised*.

Maxwell vs. *Newbold*, 181 How. 511;
Crowel vs. *Randel*, 10 Pet. 368, 398;
Brown vs. *Colorado*, 106 U. S. 639;
Hagar vs. *California*, 154 U. S. 639.

In *Hagar* vs. *California*, this court said:

> "It *nowhere appears from this record that any federal question was actually decided by the court below*. None is specifically made by the pleadings, and we cannot say that any was raised under the general allegations in the answer or demurrer. * * * *It is not enough that a federal question might have been raised*. We have no jurisdiction unless

it *actually was raised and either decided or necessarily involved in the judgment pronounced.*"

In *Chateau* vs. *Gibson*, 11 U. S. 200, this court said:

> "It must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case."

In the case at bar, the treaty was not pleaded, no right was pleaded thereunder, so far as the record shows, it was never called to the attention of the State trial court, and the case was tried and decided without reference thereto. Even if we were to admit that the treaty applied to the case at bar, the case appears from the record to have been decided wholly on the effect accorded to foreign judgments and statutes by comity of nations alone.

Plaintiff in error contends that it did in the trial court, in its pleadings, specially set and claim a right under this treaty, and thus actually raised a federal question. Let us see. It pleaded the Hawaiian decree of divorce, the Hawaiian statute that provided for a forfeiture to the husband of the wife's personal property when such a decree is rendered, and the Hawaiian judgment in an action to which defendant in error was not a party, whereby it was decided that such forfeiture took place.

We cannot tell from the argument of plaintiff in error on the motion to dismiss whether it relies upon its pleading the decree of divorce and Hawaiian statute, or the judgment in the action by the administrator of the

husband's estate against plaintiff in error, or all three, as its special setting up of its right under the treaty.

On page 8 of its brief on this motion it said: "The "effect of this Hawaiian decree (of divorce) and statute "upon the property involved was the *only defense* "attempted." This is an admission that it did not defend because of any right under the treaty, and consequently did not attempt to raise any such question.

On page 9 of said brief it said: "By thus pleading "the final adjudication of the court of a foreign "country, involving the operative effect of a statute of "that country (referring to the judgment in the admin-"istrator's case), the defendant in error necessarily "presented to the trial court a federal question, viz.: a "right claimed under a treaty, etc., etc." This is an assertion that it relied upon the treaty as a defense, and that the pleading of this judgment was a special setting up of a right under the treaty.

On page 12 of said brief, it said: "But the defendant "in the State court did not rest solely upon the judg-"ment (of divorce), but *ex industria* pleaded also the "statute * * * And by pleading this law in a "California court its express recognition by treaty "became at once a necessary question presented for "decision." This is a claim that the pleading of the Hawaiian statute was a special setting up of a right under the treaty.

On page 21 of said brief it said, after referring to the administrator's judgment as deciding that the "goods" here in question were not the property of defendant in error, "By the treaty hereinbefore referred

" to this decision of the Hawaiian court is conclusive, " and the decision of this (California) court, diametric- " ally opposed to the decision of the Hawaiian court, " deprives the defendant company of the right conferred " by this treaty." In this statement it claims that the pleading of the administrator's judgment was a special setting up of this right under the treaty.

On page 22 of said brief it said: "The Mutual Life " was claiming the decree of divorce necessarily in- " volved the application of the statute, and that there- " fore the decree and statute had force in California by " virtue of the treaty." It here relies upon the decree of divorce and statute as together being a special setting up of a right under the treaty.

We submit that plaintiff in error was correct in its first statement only, to-wit, that its only attempted defense was the decree of divorce and the statute. It never knew of the treaty until after the appeal to the State supreme court, and never thought of raising in the trial court any question thereunder.

We submit further, that neither the administrator's judgment, nor the decree of divorce, nor the statute, nor any of these together, was a special setting up of any right under the treaty.

This federal question could not be specially or at all set up by pleading this administrator's judgment, because such a plea could not be material or competent against defendant in error under any law (134 U. S. 649). No court could admit it in evidence against defendant in error. Ignoring, therefore, as we must, this judgment and the payment thereof, was the pleading of

the decree of divorce and the statute a special setting up of a right under the treaty?

Plaintiff in error relies upon the court's judicial knowledge of the treaty as sufficiently supplementing its pleading to satisfy the requirements of the third clause of Section 709, and it cites *Bell* vs. *Bell*, 181 U. S. 175, wherein the judgment of a sister State was pleaded as *res adjudicata* in a State court, and this was held sufficient to raise a federal question, and yet no specification was made in the pleading that such judgment was pleaded under the "full faith and credit" clause of the Constitution.

While it may be that in the case of *Bell* vs. *Bell* no mention *in terms* was made of the "full faith and credit" clause of the federal Constitution, it does appear that the defendant therein pleaded the judgment of a Pennsylvania court, granting a divorce, and hence terminating the marriage which, or rather the dissolution of which, was the only subject-matter or cause of action, and the existence of which was essential to the jurisdiction of the New York court, and the plaintiff replied *denying the jurisdiction of the Pennsylvania court* to grant the decree (of divorce), averring *want of service*, and also non-residence etc. of all the parties in the State of Pennsylvania, all of which was essential to jurisdiction in the Pennsylvania court. It further appeared that service was by publication only and judgment was by default. It was found that when the Pennsylvania action was begun the wife was resident in New York, and that the husband was not a *bona fide* resident in Pennsylvania.

Nothing short of express words could show more plainly that the question of "full faith and credit" to the judgment of a sister State was involved.

The action of this court, however, in a subsequent and similar case, *Jacobs* vs. *Marks*, 182 U. S. 583, would indicate *arguendo* that the mere pleading of a judgment of another State, without specially setting up the right claimed under Article IV of the Constitution was not sufficient. In this latter case this court went through the labor of a long analysis of the record to show that this constitutional right had been especially set up in the trial court, in addition to the plea of a judgment of a sister State, and yet it would seem that this court would have sustained its jurisdiction simply by referring to the plea of such judgment, if that had been sufficient.

Bell vs. *Bell* and the case at bar are not, however, similar. The mere pleading of the judgment of a sister State might well be held to be a special setting up of a right under this particular provision of the Constitution, as the pleading of it not only necessarily would suggest such a provision, but could raise no other question. In the case at bar the plea of the decree of divorce and the statute did not necessarily suggest the treaty, nor were they made competent by the treaty. They were competent under the State law as a defense tending to show that the defendant in error was not entitled to recover.

Presuming that the court might take judicial knowledge of the treaty, yet this defense would no more suffice to suggest the claiming of a right thereunder,

than the court's judicial knowledge of the Constitution or laws of Congress would suffice to raise a federal question in any case other than one like *Bell* vs. *Bell* and similar cases, which cases may be classed as the *rare exceptions* mentioned in *Columbia* vs. *Water Power Co.*

Because this court in *Bell* vs. *Bell* took judicial notice of the Constitution, plaintiff in error claims that it, "by parity of reasoning, pleading the Hawaiian de-" cree and statute, specially set up or claimed a right " under the treaty, and that a federal question was " thereby necessarily injected into the record". This is not a stronger case than *Oxley Stave Co.* vs. *Butler*, *supra*, and yet in that case it was held that the general allegation or claim in the record of the trial court that the judgment of the said court was passed against some persons who were at the time dead, and against others who were necessary parties but who had no notice of the proceedings, did not, within the meaning of Section 709 of the Revised Statutes, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States, forbidding a State to deprive any person of his property without due process of law.

If, however, it is necessary only to plead certain facts to which some provision of the Constitution, some Act of Congress, or some treaty might apply, and the court's judicial knowledge will do the rest, this court should have decided otherwise in *Oxley Stave Co.* vs. *Butler.*

To the same effect as *Bell* vs. *Bell* plaintiff in error cites:

Dupasseur vs. *Rochereau*, 21 Wall. 130;
Gregory vs. *McVeigh*, 23 Wall. 294;
Des Moines vs. *Iowa*, 123 U. S. 552.

In these cases it was held that the pleading in a State court of a prior adjudication of a United States court necessarily raised a federal question. But they fall under the *first*, and not under the *third* clause of Section 709, and therefore are not in point.

III.

No federal question was involved in the decision of the California court, nor is any federal question apparent in the record.

(1)

We have shown that the rule that, if the decision of a federal question is *necessarily* involved in the case, the fact that it was not specially set up and claimed is not conclusive against a review of such question by the supreme court of the United States, does *not* apply to the cases specified in the *third* clause of Section 709, to which class the case at bar belongs.

If, however, this rule does obtain, and it is requisite only that a federal question should be *necessarily* involved in the decision, and that this federal question should be clearly apparent in the record, still we insist that the writ should be dismissed, because, as we have pointed out, it not only *does not appear from the record that the treaty in question was in any way involved in the*

decision, but on the contrary, it appears from the record *that it was not so involved.*

Barring the briefs of counsel, and the petition for rehearing, filed in the supreme court of the State of California, and the petition for this writ of error, which are no parts of the record for this purpose, there is nothing *in this record* to show that either in the trial court or in the supreme court of the State of California the Hawaiian treaty in question was ever considered by either court, or called to its attention, or was involved in the decision. The opinion of the State supreme court did not mention it. This latter court explicitly referred to the Honolulu decree of divorce, and referred to it as one * * * " which could not " have been obtained here and upon a Hawaiian stat- " ute which has no force here except by comity", thus showing by the last words, "*by comity*", that it was not considering a right under the treaty. That court in its judgment accorded full force and effect to the decree of divorce, likwise to the Hawaiian statute, but rested its decision on the fact that the defendant in error was not affected by the statute, by reason of the fact that she was not a resident of nor domiciled in Hawaii at the time the statute could have been operative had she been there, but that on the contrary at that time she was domiciled in California, and hence that the Hawaiian statute " had no operation upon her or her personal " property here; for the law which governs personal " property is the law of the domicile ". " In our " opinion ", said the court, " the respondent at the time " when the Hawaiian statute took effect was domiciled " in California."

This opinion of the California supreme court was not modified by the petition of the plaintiff in error for a rehearing. On the contrary, the court declined to pass upon the federal question attempted to be presented in said petition, and denied a rehearing. The defendant in error, therefore, in her moving papers to dismiss this writ of error ignored said petition.

Mallet vs. *North Carolina*, 181 U. S. 592.

(2)

The treaty does not apply to this case.

Article VIII of the treaty between the United States and the Kingdom of Hawaii, from which article the plaintiff in error has quoted the particular clause upon which it relies, is as follows:

> "The contracting parties engage in regard to the personal privileges that the *citizens of the United States of America* shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands, and the *subjects of his said Majesty* in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to dispose of their personal property of every kind and description, etc., etc., and their heirs or representatives, being *subjects or citizens of the other contracting party*, shall succeed to their personal *goods*, whether by testament or *ab intestato*, and may take possession thereof by themselves or others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said *goods* are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care

shall be taken of the said *goods* as would be taken of the *goods* of a native of the same country in like case until the lawful owner may take measures for receiving them. *And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.* * * * Where on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land descend on a *citizen or subject of the other*, were he not disqualified by alienage, such *citizen or subject*, etc. * * *

"*The citizens or subjects of the contracting parties* shall not be obliged to pay, under any pretence whatever, any taxes or impositions other or greater, etc., * * * and each of the two contracting parties engages that *the citizens or subjects of the other* residing in their respective states shall enjoy their property, etc., etc."

Article IX also provides as follows:

"*The citizens and subjects of each of the two contracting parties* shall be free in the states of the other to manage their own affairs, etc."

This treaty does not apply to the case at bar because,

(*a*) *The treaty was intended to protect only the citizens of the United States and the subjects of the* Hawaiian kingdom in disputes between such citizens on the one side and such subjects on the other side, whereas the record shows or attempts to show that both the defendant in error and her husband (the only claimants to this policy of insurance) *were both citizens of the Republic of Hawaii* (successor to the Kingdom of Hawaii) *at the time of the beginning of the divorce proceedings.*

If in this divorce proceeding a question did arise as to the ownership of this policy, and the decree of

divorce and statute together took effect as of the beginning of the action, when both were such citizens, the treaty does not apply, because it relates only to disputes between a citizen of the United States on the one side and a citizen of Hawaii on the other. The treaty would not be pertinent as to disputes in either country between its own citizens.

(*b*) *This policy of insurance is not covered by the terms of the treaty.*

The treaty provides that the title to any "*goods*" shall be decided by the laws and judges of the country "wherein the said *goods* are".

The object of this treaty was to make it certain that as to corporeal personal property the title should be governed, not by the law of the domicile of the owner, but by the law of the bodily *situs* of the thing itself. Throughout the treaty the word "goods" is used in this limited sense.

Article II provides as follows:

> "No duty of customs or other import shall be charged upon any *goods*, *the product or manufacture of one country*, upon importation from such country into the other, other or higher than the duty or import charged upon *goods* of the same kind, the *product or manufacture of*, or imported from any other country."

Article III provides as follows:

> "All *goods* which can legally be exported or re-exported from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, etc., etc., etc., whether exported in ships of the other; and all *goods* and articles of whatever description,

not being of the produce or manufacture of the United States, etc., etc., etc."

Article VIII uses the word "goods" in the same sense. This term was clearly not intended to cover intangible property, such as a policy of insurance, as it cannot be said to be *in any land*, but must be in the owner thereof, whereas a horse, a piano, a barrel of sugar, necessarily has a corporeal *situs*, which may be different from the *situs* of its owner.

An insurance policy is simply evidence of a debt, payable upon a contingency (*16 Am. & Eng. Enc. of Law*, 843), an intangible thing, and has no *situs*, except as hereafter stated, distinct and apart from the residence of the holder. It pertains to and follows the person (*People* vs. *Eastman*, 25 Cal. 604). This distinction between the actual *situs* of a corporeal chattel and of intangible property is clearly pointed out by the supreme court of California in *Estate of Fair*, 128 Cal. 612. The question at issue was the taxation of certain railroad bonds that were not physically present in California, but were physically in the State of New York. It was contended that they were not taxable in California, as its constitution provided for taxing only "all property *in the State*". The court held that "intangible per-" sonal property has no *situs* apart from the domicile of " the owner * * * that not the paper writing, but " the obligation to pay is the thing of value, and in the " nature of things this can have no actual locality". This court has said the same thing. In *Kirtland* vs. *Hotchkess*, 100 U. S. 498, it said that a "debt, although

" a species of intangible property, may, for the pur-
" poses of taxation, *if not for all others*, be regarded as
" situated at the domicile of the creditor", and that a bond, "wherever actually held or deposited, is only evi-
" dence of the debt". This holds equally true as to an insurance policy. It therefore is not included in the term "*goods*" as used in the treaty, as the object of this treaty was to provide for the determining of conflicting claims to the title to tangible property by the law of their corporeal *situs*.

Plaintiff in error states, in opposition to the above, that the policy was actually in Hawaii in the possession of Carter, Administrator of the estate of the husband of defendant in error when he began the action in Honolulu against plaintiff in error. The record (trans. fol. 38) shows that the testimony on this subject was not admitted, and, therefore, the policy was not in Honolulu so far as this court can know.

It is also stated by plaintiff in error that the domicile of the insurance company was in Honolulu, and therefore that Honolulu was the *situs* of the policy, and it cites *Mutual Life* vs. *Woodworth*, 111 U. S. 138, as holding to this effect. That case simply held that under the laws of Illinois, for the purpose of administration or bringing suit, that State should be treated as the domicile of any foreign insurance company doing business therein.

(c) *No "question has arisen among several claimants as to which of them said goods belong".*

The defendant in error was not a party to the suit upon the policy in Honolulu, and the administrator of

the estate of Henri McGrew was not a party to the suit upon the policy in California. There was no *question* in Honolulu "*among several claimants*" as to which of them this policy belonged. There has been no *question* in California "*among several claimants*" as to which of them this policy belonged, and the insurance company has never claimed to be the owner of the policy. The contingency that would bring the treaty into operation therefore has never arisen.

To this plaintiff in error replies that this question arose and was determined in the divorce proceedings, wherein the Hawaiian court obtained jurisdiction over defendant in error while she was a resident of Honolulu; that "the effect which these divorce proceedings " had upon her personal property was thereafter directly " brought in issue by the case of *Carter, Administrator* " vs. *Mutual Life Insurance Company of New York*" (brief of plaintiff in error on motion to dismiss, p. 20); that in said case the Hawaiian court construed its own statute and decided "that the 'goods' here in question " were not the property of Mrs. McGrew" (same brief, p. 21).

This statement is absolutely unsupported, as this judgment, *which is not in evidence*, could not and did not decide as against defendant in error that the "goods" were not hers, and this action in Honolulu must be entirely ignored in considering the question, "Did the " title to this policy form a part of the subject matter " of the divorce action so as to amount to a *question* " *among several claimants as to which of them said goods* " *belong?*"

(*d*) *If there had been any determination of the ownership of this policy between several claimants, then, by the California judgment the ownership of this policy has been "finally decided by the laws and judges of the land wherein the said goods are".*

The decision of the State court that the domicile of the defendant in error at the time of the divorce was in California, though a non-federal question, is in line with the views of this court upon this subject. In *Anderson* vs. *Watt*, 138 U. S. 706, and *Cheever* vs. *Wilson*, 19 Wall. 108, 123, 124, this court recognized the doctrine laid down by the Supreme Court of California in this case as to the ability of a wife to obtain a a separate domicile "*in those cases where the express* " *object of all proceedings is to show that the relation* " *itself ought to be dissolved or so modified as to estab-* " *lish separate interests*".

This is such a case. The wife was ejected from her home, she was deprived of all support, and a suit for divorce was instituted. The *fact* of the one domicile of husband and wife was at an end, and the *fiction* of this unity of domicile ceased when the husband discarded his wife by ejecting her from his home and instituting proceedings for the dissolution of the bonds of matrimony.

There is no question as to the jurisdiction of the Honolulu court in the divorce proceedings. The defendant in error appeared in that case, and jurisdiction was thereby acquired, independently of her domicile. At that time, however, such was her domicile. But after the husband had excluded her from his home,

actually turned her adrift on the world, refused her both home and support, she could then change her domicile as she pleased. The husband could not claim the benefit of the fiction of one domicile, and at the same time escape its burdens by driving her from his home.

If the defendant in error was domiciled in California at the time of the decree of divorce, the Hawaiian law forfeiting her title to this policy of insurance could not under the treaty take effect, because it was not the *law of the land wherein the said policy was*. The law of the land wherein the said policy was situate, was the law of California, where the owner of the policy was domiciled.

It is claimed that as this insurance policy was delivered in Honolulu, the contract being made there, it was therefore a Honolulu contract, and must be governed by the laws of Hawaii (*Mutual Life* vs. *Cohen*, 21 Sup. Crt. Rep. 106). This may be conceded as to the construction of the contract of insurance, but it has no application to a question dehors the contract, to-wit: the question of ownership of the contract. On its face it was payable to the defendant in error. The only question was whether the Hawaiian law worked an involuntary assignment thereof, a matter entirely dehors the policy.

Argument for Affirmance.

If the motion to dismiss this writ of error be not granted, we submit that the judgment of the California Court should be affirmed. The only question in the

case is, "WAS THE TITLE OF THE DEFENDANT IN ERROR TO THIS POLICY OF INSURANCE DIVESTED BY THE DECREE OF DIVORCE?" The California Supreme Court answered this question in the negative, and upon this point we submit, without repeating them,

1. *Opinion of the Supreme Court of California* (trans. page 93).

2. *Respondent's Briefs fited in said Supreme Court* (trans. pages 59 to 74, and 89 to 92).

In considering these briefs we call attention to the point contained in folios 127 and 128 of this Transcript, and desire to state that we are aware that this Court has in *Huntington* vs. *Attrill*, 146 U. S. 664, laid down a rule different from that held by the authorities cited in these two folios as to what is a Penal Statute in an international sense. But this fact does not, however, militate against the rest of these briefs nor the opinion of the California Court, as the case was not decided upon those authorities.

Conclusions.

We therefore most respectfully submit

I.

That this writ of error should be dismissed,

1. Because there is no federal question in the case, as plaintiff in error does not claim in or for itself any right under the treaty;

2. Because no right under the treaty was specially set up or claimed as required by law;

3. Because no federal question was involved in this decision nor is any apparent in the record.

II.

That the judgment of the Supreme Court of California should be affirmed,

1. Because the decree of divorce did not divest defendant in error of her property rights in this policy of insurance;

2. Because the statute alone purported to divest the policy, and then only when the divorce was decreed;

3. Because defendant in error was domiciled in California when the divorce was decreed;

4. Because the statute could not work such divesture against a person domiciled in California.

Respectfully submitted,

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PLATT & BAYNE,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

No. 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

ALPHONSINE McGREW, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

As counsel for defendant in error reside in California, they filed their brief herein prior to the receipt of the brief on behalf of the plaintiff in error. They, therefore, file herewith a supplemental brief in reply.

I.

This court has not jurisdiction in this matter (1) *because said plaintiff in error does not claim in or for itself any right under the treaty,* and (2) *because this right under the treaty was first set up in the supreme court of the State of California.*

1. The plaintiff in error does not claim in or for itself any right under the treaty.

This point is fully argued in our brief previously filed herewith.

Plaintiff in error must rely solely upon the decree of divorce and the Hawaiian statute. This statute, and not the decree of divorce, purported to forfeit the wife's title to this policy. This gave a right to the husband, not to any one else. The Insurance Company, in setting up this right, is setting up a right in the husband, exactly as a defendant in ejectment would plead title in a third person. The fact that this husband may have sued the Insurance Company and recovered judgment cannot affect this case, as defendant in error was a stranger to such judgment. If defendant in error were to sue the Insurance Company on this policy in Hawaii, it could not defend by pleading this judgment and payment, but would have to plead the decree of divorce and the statute. Therefore it is now setting up a right under the treaty in a third person, to wit, the husband, and not in itself. The same statement applies to the right now first set up under the Constitution, and the same result must follow. This court cannot take jurisdiction.

2. The right under the treaty was first set up in the supreme court of the State of California.

In our brief heretofore filed we claimed that a right, title, privilege, or immunity under the Constitution or laws of the United States or under a treaty must be specially set up or claimed in the trial court, and we relied upon the decisions of this court in *Spies vs. Illinois*, 123 U. S., 181; Baldwin *vs.* Kansas, 129 U. S., 57; Miller *vs.* Texas, 153 U. S., 538; 11 Wall., 39.

Since writing said brief plaintiff in error has cited the decision of this court in Erie Railroad *vs.* Purdy, 185 U. S., 153, in which this court stated that a Federal question might be first set up in a State supreme court.

In this latter case, however, the court held that such a question could not be raised for the first time in a State supreme court when the rule of practice of said State court does not allow it to pass on questions not raised in the trial court. This decision is applicable to the case at bar. The rule of practice of the supreme court of the State of California is that it will not pass on questions raised for the first time in the supreme court that could have been raised in the trial court. This rule has been announced in a number of decisions of that court, among which we cite the following:

McDonald *vs.* Bear River, 13 California, 201.
Stoddard *vs.* Treadwell, 29 California, 281.
Williams *vs.* McDonald, 58 California, 527.
Anderson *vs.* Black, 70 California, 231.

3. This Federal question was not specially set up or claimed in the trial court so as to give the State supreme court an opportunity to pass on it.

In our opening brief we drew attention to the distinction in this regard between subdivision three of section 709 of the Revised Statutes and subdivisions one and two of the same section.

We cited in support of this distinction Water Power Company *vs.* Street Railway, 172 U. S., 488; Yazoo *vs.* Adams, 180 U. S., 14, as holding that under subdivisions one and

two of section 709 the Federal question need not necessarily be specially set up or claimed if it appears in the record and was decided, or if such question was necessarily involved in the case and the case could not have been decided without deciding such Federal question, but in cases arising under the third subdivision of said section the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court some jurisdiction.

None of the decisions cited by plaintiff in error overrule this distinction.

French vs. Hopkins, 124 U. S., 524, does not hold, as claimed by plaintiff in error, that the Federal question can be raised by implication, nor does it lay down the rule, as claimed by plaintiff in error, that it is sufficient if it appears from the record that the Federal question was raised either expressly or by implication.

The court in this case simply stated that that particular record did not show, either expressly or by implication, that a Federal question had been raised.

Brooks vs. Missouri, 124 U. S., 400, does not hold, as claimed by plaintiff in error, that where a decision of an alleged Federal question was necessary to a judgment rendered the court acquired jurisdiction, but simply said:

"The decision of the alleged Federal question was not necessary to the judgment rendered, and consequently is not sufficient to give us jurisdiction."

Green Bay vs. Patton, 172 U. S., 67, does not hold that it is sufficient if a Federal question was directly involved, so that the court could not have given judgment without de-

ciding it, but does hold "that it is sufficient if it appears from the record that said rights were set up or claimed in the State court in such manner as to bring it to the attention of the court."

Most of the cases cited by plaintiff in error as holding that it is sufficient in order to give this court jurisdiction that a Federal question should necessarily have been involved in the decision of the court were cases arising under subdivisions one and two of section 709, and not, as does the case at bar, under subdivision three of said section. Such cases were:

Murray *vs.* Charleston, 96 U. S., 442.
Craig *vs.* Missouri, 4 Pet., 410.
Eureka *vs.* Yuba, 116 U. S., 410.
Arrowsmith *vs.* Harmoning, 118 U. S., 195.
Furman *vs.* Nichol, 8 Wall., 44.
Dupasseur *vs.* Rochereau, 21 Wall., 130.
Gregory *vs.* McVeigh, 23 Wall., 294.
Des Moines *vs.* Iowa, 123 U. S., 552.

These latter three did not, as claimed by plaintiff in error, arise under the third subdivision of section 709, but arose under the second subdivision, as they called in question, each one of them, an authority exercised under the Constitution of the United States.

In a recent decision, *Sweringen vs. St. Louis*, 185 U. S., 445, this court said:

"We do not hold it was necessary to plead the claim in order to show it was specially set up, but it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court."

The fact is that this treaty right was not present in the minds of plaintiff in error in the trial court; was not in any way brought to the attention of the trial court, and did not occur to plaintiff in error until the case was presented by it in its brief in the supreme court of the State of California.

It does not seem, from a recent expression of this court, to be sufficient to first present a Federal question in the briefs in the State supreme court. In *New York Central vs. New York*, 186 U. S., 269, this court said:

"But assuming, *without intimating any opinion to that effect*, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the State constitution, was relied upon and that such provision must be set forth."

Previous decisions of this court have held that it is not sufficient to first raise a Federal question under the third subdivision of section 709 in the argument in the supreme court of a State.

It is strenuously insisted, however, by plaintiff in error that this Federal question, to wit, the right claimed under this treaty, was claimed in the trial court in California by the pleadings, proofs, and assignments of error.

We submit that the pleading of the judgment of divorce in the Hawaiian court did not set up any right under this treaty. This judgment of divorce was recognized by the California court, and would be recognized by any court independent of any treaty, because the Hawaiian court obtained jurisdiction over the defendant in that case, and the effect of this judgment is in no way dependent, therefore, in

any way upon any treaty. In fact, the treaty does not apply to such a judgment.

The pleading of the Hawaiian judgment in Carter, administrator of the estate of McGrew, against the plaintiff in error did not raise any Federal question under this treaty, and could not do it, because the defendant in error was not a party to said judgment, and no treaty could make such judgment material or competent against her, no matter where rendered. If said judgment had been rendered in any State of the United States instead of in a foreign country, it would not be material or competent against the defendant in error, and could not be made such, because she was not a party thereto, and therefore not bound thereby.

The same argument applies to the pleading by the plaintiff in error of the payment of this judgment. If the judgment itself could not be material or competent against the defendant in error, the payment thereof could not be material or competent.

The mere pleading of the Hawaiian statute providing for the forfeiture of the defendant in error's interest in this policy of insurance to her husband upon the rendition of the decree of divorce did not specially set up or claim any right under this treaty. If so, it would not be necessary in any case to specially set up or claim any right, privilege, or immunity under subdivision three of section 709, as has been held necessary by this court in *Oxley vs. Butler*, 166 U. S., 648, and numerous other decisions.

Did the pleading of this statute set up or claim in the State trial court a right under this treaty in such manner as to bring it to the attention of the court? The record shows that it did not.

Did the pleading of this statute show that any right under this treaty was present in the mind of the plaintiff in error as required by this court in *Sweringen vs. St. Louis?* The record shows that it did not.

Counsel for plaintiff in error claim that the offering in evidence of the judgment in the suit by the administrator and the payment of that judgment necessarily raised a Federal question under this treaty, and that this evidence was material because the treaty made it material, and that the trial court could not have decided on the materiality of this evidence without considering and deciding this treaty question.

We submit that the materiality of such evidence, to wit, a judgment in an action, in which the defendant in error was not a party, did not and could not depend upon any treaty, but entirely upon the question of State and Federal practice outside of any treaty, to wit, that evidence of a judgment in an action to which a person was not a party cannot be material evidence in an action against said party. No treaty question was or could be necessarily involved in such a decision, and therefore the denial of the treaty right was not the necessary or of any effect in law of such decision.

Counsel for the plaintiff in error claim that by the treaty alone could any extraterritorial effect be given to the Hawaiian judgment in the action by Carter, administrator, against the Insurance Company, and that therefore the refusal to admit or give any extraterritorial effect to such judgment was a denial of a right under the treaty. We submit, as we stated above, that no treaty could give any extraterritorial or any other effect to such judgment against the defendant in error.

It is claimed by plaintiff in error that a Federal question, to wit, the right under this treaty, was necessarily involved in the decision by the California court, and therefore this court has jurisdiction to review such decision.

If our contention is sound, that in all cases arising under subdivision three of section 709 it is not sufficient that a Federal question be involved in a decision of a State court, but it must be specially set up and claimed, then the mere fact that a Federal question was necessarily involved in such decision is not of itself sufficient to give this court jurisdiction.

II.

Plaintiff in error, in its brief in this court, for the first time raises a new point, to wit, that the decision in this case was in conflict with article IV, section 1, of the Constitution of the United States, providing that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and that Congress may by general laws prescribe the manner in which said acts, records, and proceedings shall be proved and the effect thereof, and that prior to the decision by the California supreme court this constitutional provision applied to Hawaii. Plaintiff in error claims that while this question was not specially set up or claimed in the California court, yet that it is an enlargement of and connected with the Federal question raised as to the treaty.

We submit, in the first place, that this claim under the Federal Constitution on its face is neither an enlargement of nor connected with the Federal question raised under the treaty, but, on the contrary, is inconsistent therewith.

If plaintiff in error is protected by a right arising under this treaty, then, of course, it cannot be protected by a right arising under the Federal Constitution, because the former could not co-exist with the latter. A right under a treaty necessitates two foreign independent governments; a right under the Federal Constitution necessitates one general government, or a superior and subordinate or dependent government. Therefore, as this right under the Federal Constitution was not in any way set up or claimed or brought to the attention of the State court, it cannot be raised for the first time in this Supreme Court. Moreover, the transcript shows that the judgment of the trial court in California was rendered October 11, 1897. The Federal question as to the treaty was first raised by the plaintiff in error in the supreme court of the State of California February 2, 1898; and the brief of plaintiff in error shows that the act of Congress annexing the Hawaiian islands and bringing them under the Federal Constitution was not passed until April 30, 1900. This Federal question, therefore, could not have been raised in the supreme court of California prior to April 30, 1900. The raising of it at that time, however, would have been of no effect as to this case so as to compel the giving of full faith and credit to the Hawaiian statute forfeiting the wife's policy, because at that time said statute had been repealed by the Hawaiian legislature (Hawaiian Laws 1896, page 20, act 24). This act of annexation could not raise any Federal question as to the judgment in the case of Carter against The Insurance Company, because, as we have said before, no act or constitution could give any such judgment any effect against the defendant in error. It did not require this act of annexation to give effect

to the decree of divorce in Hawaii, because that was operative any way, and its effect was not denied by the California court.

Plaintiff in error claims that under this constitutional provision, if this court can consider it, that full faith and credit must be given to the Hawaiian decree of divorce, and that this decree of divorce in Hawaii divested the title to this policy of insurance from the defendant in error and vested it in her husband.

We submit that the only effect upon this policy of this decree of divorce in Hawaii was to make operative the statute in Hawaii; that without this statute, even in Hawaii, the title to this policy could not be forfeited, and that, therefore, the giving in this country of full faith and credit to this Hawaiian decree of divorce does not affect the title to this policy.

Even the Hawaiian court, in its opinion in the administrator's action, did not hold that the interest of the defendant in error passed by the decree of divorce to her husband, but that it passed by the statute. There has been no judgment in Hawaii in any action, in which the defendant in error was a party, that has decided as to the title to this insurance policy.

Counsel for the plaintiff in error have argued at some length that under this constitutional provision full faith and credit must be given to the Hawaiian statute and Hawaiian judgments, even though this constitutional provision did not go into effect until after the judgment of the trial court in California. We submit that this argument, however learned, is not in point, because, as we have before stated, the Federal question raised by this constitutional provision was

in no way presented to either the trial or appellate court in California, and under none of the opinions heretofore rendered by this court can this court now consider this question.

Plaintiff in error claims that under this constitutional provision the supreme court of California was bound to give the Hawaiian judgment, in the administrator's action, the same faith and credit as is given it in Hawaii, and that in Hawaii it decided that the title to this policy had passed from the defendant in error and was vested in her husband. We submit that such judgment, even in Hawaii, would not be binding upon the defendant in error. It would not be binding upon her even had it been rendered in the State of California, or in any other State of the Union. It could not be pleaded against her in any action she might bring anywhere upon this policy. It is not true that in this action the Insurance Company litigated the question of the ownership of this policy on behalf of the defendant in error. She was entirely a stranger to this action and was in no way bound by the result of it, and the Insurance Company was in no way authorized to represent her therein.

III.

Plaintiff in error contends that Hawaii was the land in which the goods were, to wit, this policy, and therefore the ownership should be determined by the laws of Hawaii. It bases this contention upon the following reasons:

(1.) That the policy, to wit, the written document, was in Hawaii; and

(2.) Because the policy could be there enforced.

We submit that the written document was merely evidence of the promise of the Insurance Company to pay so much money upon certain contingencies, and that the mere physical location of the written document in no way determined the *situs* of this promise or contract. There is no evidence, even, that this contract of insurance was executed in Hawaii, so as to make it a Hawaiian contract. There is no evidence to show that this policy was applied for in Hawaii, or that the first premium was paid there, or that it was in any sense a Hawaiian contract. Plaintiff in error states these as facts, but there is nothing in the record to sustain it.

It does not appear from the evidence where this contract was executed, unless it may be gathered from the instrument itself that it was executed in New York.

The second reason of plaintiff in error, that this contract of insurance was situated in Honolulu, because it could be there enforced, would also make its *situs* the State of New York, because from its very terms it could be there enforced.

IV.

There has been no dispute among several claimants as to which of them this policy belongs.

Counsel for plaintiff in error contends that defendant in error has stated that such a dispute has arisen by the statement in our brief that "if there had been any determination of the ownership of this policy between several claimants, then by the California judgment the ownership of this policy has been finally decided by the laws and judges of the land wherein the said goods are."

We do not concede that there has been a dispute either in Honolulu or California between several claimants as to whom this policy belongs. We simply meant in the above statement that if there had been a decision in such dispute the only binding decision must have taken place in California, because there the policy was situated.

Plaintiff in error claims that there has been a dispute in Honolulu between claimants to such policy; that the two claimants were the administrator of the estate of Henry McGrew and the Insurance Company, and that the defendant in error was not a necessary party to this dispute in Honolulu. We submit that the only two claimants to this policy are the administrator of the estate of Henry McGrew and the defendant in error; that the Insurance Company in no way represented the defendant in error or was a trustee for her; that in any dispute between those two claimants the defendant in error necessarily must be a necessary party, and that it is admitted that she was not a party to the administrator's action in Honolulu in which the plaintiff in error contends that the dispute took place.

It would be a remarkable conclusion to hold the defendant in error bound by any claim put forward by the Insurance Company in Hawaii, or to hold that the Insurance Company was in any sense a claimant of this policy under the language of the treaty.

The Insurance Company has never claimed any ownership of this policy, and it has not produced any evidence to show that it was authorized by defendant in error to act for her in claiming it, and we do not think it can be held to be a restrictive construction of the treaty to hold that the word

"claimants" in the treaty means only persons who claim an ownership in goods protected by the treaty.

Plaintiff in error contends, however, that it is not necessary under the treaty that there should be actual litigation between the several claimants touching the title to the goods, but that it is sufficient if, in any litigation between any one, it becomes necessary to pass upon the title to goods. We submit that the language of the treaty, "if a question should arise among *several claimants*," cannot be construed to mean "if a question should arise among *any one*."

Plaintiff in error contends that defendant in error is bound by the litigation between the administrator and the Insurance Company according to the spirit of the two Hawaiian decisions, Jardin *vs.* Maderos, 9 Hawaiian Rep., 503, and Kaleialii *vs.* Grinbaum, 9 *id.*, 213. But these cases are not in point, as no one in administrator's suit was one in interest with defendant in error.

We submit that the administrator's judgment and its satisfaction must be eliminated as a false quantity from this controversy, and the contention limited to these questions:

(1.) Has the plaintiff in error claimed any right under the treaty or the Constitution for *itself?*

(2.) Is it not simply claiming a right in another and not in itself?

(3.) Is it in law subrogated to this other person?

(4.) Did it specially set up a right under this treaty as required by law?

(5.) Can this court consider the constitutional point?

(6.) Was not the *situs* of this policy in California when the divorce was decreed?

(7.) Has there been yet any dispute between claimants to this policy?

(8.) Does the treaty apply to this policy?

(9.) Was the title to this policy determined by the decree of divorce alone, or by the statute?

We submit that the principal question before this court is not, as plaintiff in error contends, whether it shall be compelled to pay this policy twice, but whether, if this court has jurisdiction at all, defendant in error is the only proper person to whom, under our laws, this policy should be paid.

RICHARD BAYNE,
H. G. PLATT,
Counsel for Defendant in Error.

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Supreme Court of the United States.

No. 109.—October Term, 1902.

The Mutual Life Insurance Company of New York, Plaintiff in Error, *vs.* Alphonsine McGrew. } In error to the Supreme Court of the State of California.

[February 23, 1903.]

This is a writ of error to revise the judgment of the Supreme Court of the State of California, affirming a judgment of the Superior Court of the city and county of San Francisco in favor of Alphonsine McGrew and against the Mutual Life Insurance Company of New York. 132 Cal. 85.

The action was brought on a policy of insurance payable to Alphonsine C. McGrew, and in the amended answer to the complaint the recovery of a decree of divorce was averred, and it was alleged: "That under and by virtue of the Hawaiian law in force at the time said decree of divorce was granted and now in force, it is provided: 'When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall be issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the curtsey; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her, as it may deem proper.' That under and by virtue of the foregoing provision of law, and decree of divorce, all rights of the said Alphonsine C. McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever."

The amended answer also averred that after McGrew's death, one Carter was duly appointed in Hawaii administrator of his estate; that as such administrator he commenced suit against the insurance company in a Circuit Court of Hawaii on the policy of insurance; recovered judgment October 15, 1895, for the full amount; that the Supreme Court of Hawaii affirmed the judgment, and subsequently denied an application for rehearing, and that the judgment was thereafter paid.

The trial court made findings of fact as follows:

"1. On the 14th day of September, 1892, this defendant made, executed, and delivered to Henri G. McGrew, a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant promised and agreed to pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand dollars ($5,000.00), upon the death of the said Henri G. McGrew, during the continuance of said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri G. McGrew, and upon acceptance of satisfactory proof of the death of said Henri G. McGrew, during the continuance of said policy.

"2. Henri G. McGrew died on the 22d day of October, 1894, in Honolulu, Hawaiian Islands, and said plaintiff survived him.

"3. Said Henri G. McGrew, upon said 14th day of September, 1892, and continuously and up to the time of his death, was a resident of, and domiciled in, the Hawaiian Islands.

"4. On the 9th day of February, 1895, plaintiff presented to said defendant satisfactory proof of the death of said Henri G. McGrew, and demanded of said defendant the payment of the sum of five thousand ($5,000.00) dollars, under and in accordance with the terms of said policy of insurance, but defendant has never paid the same, or any part thereof.

"5. Subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri G. McGrew became of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing in the city of Honolulu, was duly appointed the guardian of the person and estate of said Henri G. McGrew, an incompetent person, and continued to hold such office of guardian at the time of the filing of the libel of divorce, and the proceedings thereunder hereinafter mentioned.

"6. On the 8th day of February, in the year 1894, Charles L. Carter, as guardian and on behalf of Henri G. McGrew, an incompetent person, filed in the Circuit Court of the first judicial circuit of the Republic of Hawaii, which said court has jurisdiction over said parties and over libels for divorce, a libel praying for a divorce from said plaintiff on the ground of her adultery; and thereafter, and on the 11th day of April, 1894, this plaintiff being then a resident of, and domiciled in, said Hawaiian Islands, appeared in said action and contested the same.

"7. On the 23d day of August, 1894, a decision was rendered, and on the 24th day of August, 1894, a decree was signed in said cause by the said Circuit Court, dissolving the bonds of matrimony theretofore existing between said Henri G. McGrew and this plaintiff, upon the ground of the adultery of this plaintiff.

"8. On the 5th day of April, 1894, this plaintiff left the Hawaiian Islands with the intention of not returning to said islands, but of coming to the State of California and of making her home in, and permanently residing in, said State. And thereafter, and in due course of her voyage from the Hawaiian Islands and in said month of April, this plaintiff arrived in the State of California, and with said intention above mentioned, thereupon took up her residence in, and made her home in, said State, and with said intention has ever since continuously remained in, and resided in, and made her home in, said State of California; and on the 23d and 24th days of August, 1894, was actually in, and residing in, said State,

with the intention above mentioned of permanently residing and making her home in said State of California.

"9. Prior to said 5th day of April, 1894, this plaintiff had been excluded by said Charles L. Carter, as such guardian, from the home of said Henri G. McGrew, and was by him thereafter prevented from returning, and has ever since and until the death of said Henri G. McGrew been by him prevented from returning to the same, and was, on said 5th day of April, excluded from said home by said guardian.

"10. On said 5th day of April, 1894, this plaintiff had no home, and has never since had a home in the Hawaiian Islands."

[Findings 11, 12, 13, 14, 16 and 17 referred to the filing of a bill of exceptions by Mrs. McGrew in the divorce suit, and the statute and rule of court of Hawaii in respect of the practice in relation thereto.]

"15. The following Hawaiian law was in force in the Hawaiian Islands at the time said decree of divorce was granted, to wit: When a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

And the court concluded as matter of law that the rights of Mrs. McGrew in and to the policy and the moneys due thereunder never passed to her husband, nor did the policy or money due thereunder ever become his property; and that the insurance company was indebted to Mrs. McGrew on said policy in the sum of $5,000 and interest. Judgment was rendered accordingly October 11, 1897, and the case was carried to the Supreme Court of the State, and the record filed therein December 13, 1897. The judgment was affirmed February 28, 1901, and a petition for rehearing denied. 132 Cal. 85. This writ of error was allowed by the Chief Justice of that court.

The Supreme Court of California held that the construction given by the courts of the Republic of Hawaii to the statute of that republic that permitted an action for a divorce to be maintained by the guardian of an incompetent person should be accepted, although such was not the law of California, and that the judgment of divorce rendered in that republic, in pursuance of the statute so construed, should, by comity, be given effect by the courts of California as a decree of divorce; that the statute of Hawaii declaring that, where a divorce is decreed for the adultery of the wife, the husband shall take her personal estate, could have no operation pending the suit for divorce, and not until after the entry of judgment; that Mrs. McGrew was bound by the decree of divorce in Hawaii, so far as the dissolution of the bond of matrimony was concerned, she having appeared to the action; that when a husband commences a suit for divorce, the wife may acquire a separate actual domicil by change of residence from one country to another pending the suit; that Mrs. McGrew became domiciled in California prior to the entry of the decree, and that the statute of Hawaii declaring the forfeiture of her personal property to the husband could not operate in California to affect her, or to give to the

husband a policy of insurance, which, by its terms, was payable to her, and which, at the time of the decree, was governed by the law of her domicil in California. No allusion whatever was made by the Supreme Court to the treaty between Hawaii and the United States.

The decisions of the Supreme Court of Hawaii are reported, *McGrew, a person non compos, by his Guardian, Charles L. Carter,* v. *Alphonsine McGrew,* 9 Hawaii, 475; *McGrew &c.* v. *McGrew,* 10 Hawaii, 600; *Carter* v. *Mutual Life Insurance Company,* 10 Hawaii, 117; *S. C.,* Id. 559; *S. C.,* Id. 562.

In the opinion on the last hearing, December 16, 1896, the court observed: "The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely on the assumption that the two courts will take the same view of the law." The court also considered the point that the statute in question, section 1331 of the Civil Code, was repealed by implication by the Married Women's act of 1888. But it held that the section was not inconsistent with that act, and that it might "be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery." And the court said that it was glad to know that the section had been repealed. Section 1331 was repealed May 12, 1896, (Laws Hawaii, 1896, p. 70, Act 24.)

Article VIII of the treaty between the United States and the Kingdom of Hawaii was as follows:

"The contracting parties engage, in regard to the personal privileges, that the citizens of the United States of America shall enjoy in the dominions of his Majesty, the King of the Hawaiian Islands, and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, . . . and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato*; and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments, such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a question should arise among several claimants as to which of them said goods belonged, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease

of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, where he not disqualified by alienage, such citizen or subject," &c. 9 Stat. 977.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Appellate jurisdiction was conferred on this court by the twenty-fifth section of the judiciary act of 1789, over final judgments and decrees in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, in three classes of cases: The first class was where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question, and the decision was against their validity; the second was where the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, was drawn in question, and the decision was in favor of their validity; and the third was "or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up and claimed by either party under such clause of the said Constitution, treaty, statute or commission." 1 Stat. 73, 85, c. 20, § 25.

By the second section of the act of February 5, 1867, (14 Stat. 385, 386, c. 28,) the original twenty-fifth section was re-enacted with certain changes, and, among others, the words just quoted were made to read: "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." And this was reproduced in § 709 of the Revised Statutes. The change from the drawing in question of the construction of a clause of the Constitution, or of a treaty, statute, or commission, to the claim of a right under the Constitution, treaty, statute, commission, or authority, emphasized the necessity that the right must be specially set up, and denied.

In *Baltimore & Potomac Railroad Company* v. *Hopkins*, 130 U. S. 210, the distinction between the denial of validity and the denial of a title, right, privilege or immunity specially set up or claimed, is pointed out, as well as the distinction between the construction of a statute or the extent of an authority and the validity of a statute or of an authority.

Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in § 709, and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must

not only be specially set up or claimed, but at the proper time and in the proper way.

The proper time is in the trial court whenever that is required by the State practice, in accordance with which the highest court of a State will not revise the judgment of the court below on questions not therein raised. *Spies* v. *Illinois*, 123 U. S. 131; *Jacobi* v. *Alabama*, 187 U. S. 133; *Layton* v. *Missouri*, 187 U. S. ; *Erie Railroad Company* v. *Purdy*, 185 U. S. 148.

The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb* v. *Trustees*, 179 U. S. 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sayward* v. *Denny*, 158 U. S. 180; *Zadig* v. *Baldwin*, 166 U. S. 488. The assertion of the right must be made unmistakably and not left to mere inference. *Oxley Stave Company* v. *Butler County*, 166 U. S. 648.

If the highest court of a State entertains a petition for rehearing, which raises Federal questions, and decides them, that will be sufficient; *Mallett* v. *North Carolina*, 181 U. S. 589; or if the court decides a Federal question which it assumes is distinctly presented to it in some way. *Home for Incurables* v. *New York*, 187 U. S. 155; *Sweringen* v. *St. Louis*, 185 U. S. 46.

Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge. *Powell* v. *Brunswick County*, 150 U. S. 433; *Mountain View Mining & Milling Company* v. *McFadden*, 180 U. S. 533; *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 185.

Counsel by their specification of errors, under rule 21, assert the Federal questions to be that the decision of the Supreme Court of California was against a title, right, privilege or immunity claimed by plaintiff in error under the treaty between the United States and Hawaii. And that the decision was in contravention of section 1 of Article IV of the Constitution.

1. We do not find that any claim under the treaty was made in the trial court, and the rule of practice of the Supreme Court of California is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court. *Stoddard* v. *Treadwell*, 29 Cal. 281; *King* v. *Myer*, 35 Cal. 646; *Deady* v. *Townsend*, 57 Cal. 298; *Williams* v. *McDonald*, 58 Cal. 587; *Anderson* v. *Black*, 70 Cal. 226, 231.

Neither the pleading of the decree of divorce nor of the statute of Hawaii providing for the forfeiture of Mrs. McGrew's rights in the policy of insurance, as construed by the Supreme Court of Hawaii, nor of both together, amounted to specially asserting any right under the treaty. Those averments did not assert that claim in the trial court in such manner as to bring it to the attention of that court, nor indeed, to show that any right under the treaty was present in the mind of counsel.

To give them that effect would be in the teeth of our decision in *Oxley Stave Company* v. *Butler County*, and numerous other decisions. That case involved a decree, in respect of which there was a general allegation that it was rendered against dead persons, as well as in the absence of necessary parties who had no notice of the suit; and we held that such general allegations did not meet the statutory requirement that the final judgment of a State court may be re-examined here if it denies some title, right, privilege, or immunity "specially set up or claimed" under the Constitution or authority of the United States. Mr. Justice Harlan said: "This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. . . . Upon like grounds the jurisdiction of this court to re-examine the final judgment of a State court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

This also disposes of the suggestion that the offering in evidence of the judgment in the suit by the administrator, and of evidence of its payment, raised a Federal question under the treaty, for no such ground was taken in relation to that evidence, to say nothing of the fact that Mrs. McGrew was not a party to that suit.

In the bill of exceptions there is an enumeration of certain objections to the entry of judgment and certain errors of law alleged to have occurred during the trial, and to have been excepted to by defendant, which embraces the objection that the decision of the trial court was against law, because, among other things, the findings of fact did not determine the issues raised by the allegation in the answer quoted in the statement preceding this opinion, and that the court erred in sustaining the objection of plaintiff to the introduction of evidence of payment by the company to the administrator of the amount due on the policy. But there is no reference to the treaty, and all this no more set up the claim than the answer itself.

In fact, the question was not even raised in the Supreme Court, though, if so, the court was not then bound to regard it. Reference was made in the briefs in the Supreme Court to the treaty, but those references did not specially set up or claim any right as secured by the treaty, nor were the briefs made part of the record by any certificate or entry duly made, and our attention has not been called to any statute or rule of court in California making them such.

In the petition for rehearing it was said that the treaty made the decision in *Carter* v. *Insurance Company* controlling, and if that could be considered as a compliance with § 709, which we do not think it could, it came too late, and the petition was denied without an opinion. In doing so that court adhered to the usual course of its judgments, and its action cannot be revised by us. If the Supreme Court of California had seen fit on that petition to entertain the contention of plaintiff in error as asserting a Federal right, and had then decided it adversely, the case would have occupied a different position.

Where a State court refuses to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and the parties, it denies the validity of an authority exercised under the United States; and where a State court refuses to give effect to the judgment of a court of another State it refuses to give full faith and credit to that judgment. The one case falls within the first class of cases named in § 709 and the other within the third class.

Where a judgment of another State is pleaded in defense, and issue is made upon it, it may well be ruled that that sets up a right under the third subdivision, because the effect of the judgment is the only question in the case, but here the plea of the decree of divorce and the statute did not necessarily suggest or amount to a claim under the treaty. They were properly admitted in evidence under the State law for what they might be worth as a defense, but that did not involve the assertion of an absolute right under the treaty.

The Supreme Court of Hawaii in its second opinion in the administrator's case said that the company, not having brought Mrs. McGrew in by interplea, must rely on the courts of California taking the same view that the courts of Hawaii did, but did not intimate that the courts of California were compelled by treaty to take that view.

Nor can this failure to claim under the treaty be supplied by judicial knowledge. We so held in *Mountain View Mining and Milling Company* v. *McFadden*, 180 U. S. 533, where we ruled that judicial knowledge could not be resorted to to raise controversies not presented by the record; and Professor Thayer's Treatise on Evidence was cited, in which, referring to certain cases relating to the pleadings and matters of record, it was said "that the right of a court to act upon what is in point of fact

known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." *Arkansas* v. *Kansas and Texas Coal Company*, 183 U. S. 190.

That rule must necessarily govern us in passing on the question of our appellate jurisdiction under § 709.

The Supreme Court of California held that the Hawaiian statute had no force in California "except by comity;" accorded full effect to the decree of divorce as dissolving the bond of matrimony, but decided that Mrs. McGrew was not affected by the statute because she was not domiciled in Hawaii, and was domiciled in California, when that decree was rendered, and when the statute could have operated if she had been domiciled in Hawaii; and that the statute "had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile." As to whether a Federal question was involved at all, see *Roth* v. *Ehman*, 107 U. S. 319; *Roth* v. *Roth*, 104 Ill. 35; Württemburg Treaty, 1844, Comp. Treaties, (1899,) 656.

It is argued that by the judgment against the company in favor of McGrew's administrator, the Hawaiian courts had adjudicated that Mrs. McGrew's title passed to the administrator. But Mrs. McGrew was not a party to that action, and was not bound by it, so that it could be pleaded against her. The insurance company did not litigate the question of ownership on her behalf and was in no way authorized to represent her. In any point of view we return to the contention that it was in virtue of the treaty that the California courts were obliged to accept the Hawaiian decisions, and the record fails to show that a right or title was set up thereunder.

2. The second question indicated by plaintiff in error is that the decision was in conflict with § 1 of Article IV of the Constitution, providing that full faith and credit in each State shall be given to the public acts, records and public proceedings of every other State, as carried out by § 905 of the Revised Statutes, because it is insisted that prior to the decision this constitutional provision applied to Hawaii, and should be regarded as an enlargement of and connected with the alleged claim of right under the treaty. But an alleged right under a treaty between two foreign nations is inconsistent with an alleged right arising under the Federal Constitution, and as a right under the Constitution it was not at any time or in any way brought to the attention of the State courts. The judgment of the trial court was rendered October 11, 1897. The resolutions of annexation were passed July 7, 1898. The act to provide a government for Hawaii was passed April 30, 1900. By this act it was provided that the laws of Hawaii, not inconsistent with the Constitution and laws of the United States, or the provisions of the act, should remain in force,

subject to repeal or amendment, but the act forfeiting the wife's property was repealed May 12, 1896. Laws Hawaii, 1896, p. 70.

The judgment of the Supreme Court of California was rendered February 28, 1901, and we cannot retain jurisdiction on the ground of the assertion of a Federal right which did not exist when the judgment was rendered in the trial court, and which was not brought to the attention of the highest court of the State in any way whatever.

Writ of error dismissed.

Mr. Justice PECKHAM took no part in the consideration and disposition of this case.

Mr. Justice WHITE dissented.

True copy.

Test:

Clerk Supreme Court, U. S.